SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 660

ANNIE SAUDER, ADMINISTRATRIX OF THE ESTATE OF PHILIP SAUDER, DECEASED, ET AL., PETITIONERS,

vs.

MID-CONTINENT PETROLEUM CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THIRD DIVISION

Pleas and proceedings before The Honorable Richard J. Hopkins, Judge of the United States District Court for the District of Kansas, presiding in the following-entitled cause:

Equity. No. 337-N

ANNIE SAUDER, Administratrix of the Estate of Philip Sauder, Deceased, et al., Plaintiffs,

vs.

MID-CONTINENT PETROLEUM CORPORATION, a Corporation, Defendant

IN DISTRICT COURT OF GREENWOOD COUNTY, KANSAS

PHILIP SAUDER, Plaintiff,

vs.

MID-CONTINENT PETROLEUM CORPORATION, a Corporation, Defendant

No. 15292

PETITION—Filed June 27, 1930

Comes now the plaintiff, Philip Sauder, and for his cause of action against the defendant above named, alleges and shows the court that he is an actual bona fide resident of Greenwood County, Kansas, and that his true and correct post office address is Gridley, Kansas.

Plaintiff further alleges that he is the owner in fee simple of the following described real estate lying and situate in the County of Greenwood and State of Kansas, to-wit:

The East Half and the Southeast Quarter of the Southwest Quarter of Section 16, Township 23, Range 13, containing 360 acres more or less.

Plaintiff further alleges that heretofore and upon the 6th day of June, A. D. 1916, he made, executed and delivered to W. A. Moon and J. W. Phillips his certain oil and gas lease, in writing, of that date, by the terms of which he leased said land for gas and oil. A copy of said lease is attached hereto marked Exhibit A, and is hereby made a part of this petition as fully as though written in at this place in full.

[fol. 2] Plaintiff further alleges and shows the court that thereafter and upon August 9, 1917, said Moon and Phillips duly assigned said lease to Atlantic Petroleum Corporation and said assignment is of record in the office of the Register of Deeds of Greenwood County, Kansas, in Book 2 of Assignments at Page 241. That thereafter and upon February 24, 1925, said Atlantic Petroleum Corporation duly assigned said lease to Cosden & Company and said assignment is of record in the office of said Register of Deeds in Book CC of Miscellaneous records at page 325.

That thereaf-er, but plaintiff can not give the exact date, said Cosden & Company became the Mid-Continent Petroleum Corporation, and said Mid-Continent Petroleum Corporation became and is the owner of said lease.

The said Mid-Continent Petroleum Corporation, defendant above named, is a Delaware Corporation with its post office and place of business at Tulsa, Oklahoma, and is authorized to do business in the State of Kansas as such corporation.

Plaintiff further alleges and shows the court that thereafter and on or about the 1st day of November, 1921, the said defendant, Mid-Continent Petroleum Corporation, completed a well in accordance with the terms of said oil and gas lease Exhibit A, upon the Southeast quarter of the Southwest Quarter of said Section 16, and that oil and gas were found therein in paying quantities. Said plaintiff further alleges and shows the court that thereafter and on or about the 1st day of January, 1922, said defendant, Mid-Continent Petroleum Corporation, completed another well upon said Southeast Quarter of the Southwest Quarter of said Section 16, and found therein oil in paying quantities; that aside from said two wells above described, during all the years intervening since the date of said lease, no effort has been made and no act performed by said defendant, Mid-Continent Petroleum Corporation, or any other holder

or owner of said lease, toward the development of said real estate described above for oil and gas. No well has been drilled, no locations made, no effort whatever has been put forth by said defendant, Mid-Continent Petroleum Corporation, to explore for oil and gas or to develop said land for oil and gas; that on or about the 1st day of Jan-
[fol. 3] uary, 1922, for the purpose of pumping the two wells above herein described, the said defendant located and erected upon said Southeast Quarter of the Southwest Quarter of Section 16, a power plant; that until the year 1927, the exact time the plaintiff is unable to state, said two wells were pumped by power furnished by said power plant located on said Southeast Quarter of the Southwest Quarter of Section 16, but that thereafter, and about the month of September, 1927, the said defendant, Mid-Continent Petroleum Corporation, removed said power plant and procured power for the pumping of said two wells from an adjacent leasehold operated by said defendant, and is still so procuring power for that purpose.

Plaintiff further alleges that on or about the 11th day of December, 1924, the exact date the plaintiff cannot state, plaintiff demanded of the then owners of said lease and predecessors of Mid-Continent Petroleum Corporation, that they proceed with the development and exploration of said real estate above described for gas and oil; that said demand was upon one Harry George, who at the time was District Supt. for the Cosden and Company and The Atlantic Petroleum Corporation, predecessors of said Mid-Continent Petroleum Corporation, in charge of this and other property in Greenwood County, and Woodson County, Kansas. Said plaintiff made similar demands at various times from the date of said lease until 1928, on various employees and agents of said holders of said lease, but is unable to state names or dates.

Plaintiff further alleges and shows the court that on the 16th day of June, 1926, plaintiff wrote a letter to the said defendant, Mid-Continent Petroleum Corporation, calling attention to the fact that no work had been done toward the exploration or development of any of the property herein described, except said Southeast Quarter of the Southwest Quarter of said Section 16, and demanding that development proceed, and if said Mid-Continent Petroleum Corporation did not intend to develop said land that the said

lease should be cancelled by said Mid-Continent Petroleum Corporation. A copy of said letter is hereto attached marked Exhibit B and made a part of this petition. That shortly thereafter this plaintiff received a letter from said Mid-Continent Petroleum Corporation, in which the said Mid-Continent Petroleum Corporation stated that it considered said lease a valuable one and that it would not cancel the same. A copy of said letter is hereto attached [fol. 4] marked Exhibit C, and made a part of this petition. Plaintiff further alleges and shows the court that no effort has since that time been made and no act performed toward the development of said leased premises or any part thereof.

Plaintiff further alleges and shows the court that there is oil development upon land adjacent to the land in question as follows: That on the half section of land immediately east of said half section owned by plaintiff, there are now 25 producing oil wells producing oil in good paying quantities; that upon the quarter section of land immediately north of the Northeast Quarter of said Section 16, there is a producing oil well; that upon the North Half of the Southwest Quarter of said Section 16, lying immediately west of plaintiffs' land, there are 3 oil wells, producing oil in paying quantities, and one dry hole has been drilled upon said 80 acres of land; that upon a 40 acre tract of land, being the Southwest Quarter of the Southwest Quarter of said Section 16, there are three producing oil wells and no dry wells; that upon the North Half of Section 21, lying immediately south of the said Section 16, there are 15 producing oil wells producing oil in paying quantities and only one dry hole; that upon the Northwest Quarter of Section 22, lying immediately south and east of said Section 16 and cornering with the plaintiffs' land, there are 12 producing oil wells, producing oil in paying quantities and no dry holes has been drilled upon said property. That from the oil wells upon adjacent land, although none are closer than four hundred feet from plaintiffs' line, several are close enough, that plaintiff is informed and verily believes and therefore alleges that there is grave danger that oil deposits, if any, under the land of this plaintiff, will be drawn off or depleted by the pumping of oil upon adjacent land; that said oil production upon adjacent land has been going on for a number of years and that no

new wells have drilled upon said adjacent land since the year 1922.

Plaintiff further alleges that under the terms of said lease it was the duty of the holders thereof and especially of the defendant, Mid-Continent Petroleum Corporation, to fully explore and develop said lands for oil and gas, and plaintiffs allege that during the past years and ever since June 6, 1916, the said defendant, Mid-Continent Petroleum [fol. 5] Corporation, and all of the parties to whom said lease may have been assigned have wholly failed, refused, and neglected to develop said land for oil and gas with the single exception of the two wells hereinbefore mentioned on the Southeast Quarter of the Southwest Quarter of said Section 16 and adjacent to the Southwest corner of said Half Section herein described belonging to plaintiff; that no effort whatever has been made to explore the east half of said Section 16, that the said defendant, Mid-Continent Petroleum Corporation, although repeatedly requested and demanded so to do, as hereinbefore stated, has wholly refused and failed to further develop said land for gas and oil.

Plaintiff further alleges that since the year 1922, at least the development of oil upon land adjacent to the land described herein belonging to plaintiffs has made it practically certain that oil could have been discovered in paying quantities by the drilling of wells upon said East Half of said Section 16, but that notwithstanding said fact, the said defendant, Mid-Continent Petroleum Corporation, has refused to develop said land and has held the same for speculative purposes and that by reason of such refusal said defendant, Mid-Continent Petroleum Corporation in equity and good conscience, has forfeited its right to further hold said lease and should be by this court adjudged and decreed to be wholly in default of its obligations under the terms of said lease, and said lease should be by the court cancelled, set aside and held for naught as to all of said land described herein, with the possible exception of land immediately adjacent to the two wells heretofore described lying and situate in the South part of the Southeast Quarter of the Southwest Quarter of said Section 16.

Plaintiff further alleges that unless said lease be cancelled, by this court, said defendant, Mid-Continent Petroleum Corporation, will continue to hold said lease for

speculative purposes and thereby plaintiffs will be deprived of the very objects, purposes, and things which were the consideration for the execution of said oil and gas lease in the first instance.

Wherefore, the premises considered, plaintiff prays for a judgment and decree of this honorable court, cancelling said lease and that said lease be cancelled, set aside and held for naught as to all of said lands, except such portion [fol. 6] of said Southeast Quarter of the Southwest Quarter of said Section 16, immediately adjacent to said two wells described in the petition herein, as the court may designate and plaintiff prays that he may have such other, further and additional relief as he may be entitled to receive in equity and good conscience, including his costs herein expended.

Ray S. Pierson, W. L. Huggins, Attorneys for Plaintiff. Elwin Ware, of Counsel.

[File endorsement omitted.]

EXHIBIT A TO PETITION

Oil and Gas Lease

This Agreement, Made and entered into this 6th day of June, A. D. 1916, by and between Philip Sauder, Annie Sauder, his wife of Greenwood County, State of Kansas, parties of the first part, and W. A. Moon and J. W. Phillips, parties of the second part:

Witnesseth: That the said parties of the first part in consideration of the sum of $1.00 (one) Dollars, receipt of which is hereby acknowledged to them duly paid by the said parties of the second part, and of the covenants and agreements hereinafter contained on the part of the said parties of the second part, to be kept and performed, do hereby Lease and Let unto the said parties of the second part the exclusive right for Ten Years from date hereof, and as long thereafter as Oil or Gas can be procured thereon in paying quantities, to enter upon, operate for and procure Oil and Gas upon the following described premises, situated in Greenwood County, State of Kansas, to-wit East ½ of Sec. 16 Town. 23 Range 13 Acres 320. South-

east ¼ of Southwest ¼ Sec. 16 Town. 23 Range 13 Acres 40,

The Parties of the second part agree to deliver to the parties of the first part one-eighth of the Oil realized from these premises, in tanks at the wells without cost, or pay the market price therefor, in cash, at the option of the first parties. If Oil or Gas be found on these premises by said second parties, all rights, benefits, and obligations secured [fol. 7] hereby shall continue so long as either can be procured in paying quantities.

If sufficient gas is found in any well or wells producing gas only, on said premises, to justify the expenses of saving and casing same, said first parties to have on demand, sufficient gas from such well or wells, free of cost at such well or wells for domestic purposes on said premises, the second parties to have the remainder thereof, with free gas or oil for drilling and operating all machinery. If, however, second parties shall market or sell gas from any well producing gas only, it shall pay said first parties or assigns therefor $100.00 (One Hundred Dollars) per year for and during such time gas shall be sold or marketed, said payment to be made on each well within sixty days after commencing to sell gas therefrom, and annually thereafter, while such gas is sold or marketed from such well or wells.

Second parties agree to locate all wells so as to interfere as little as possible with the cultivated portion of the premises, and pay all damages by reason of its operation, and not to locate any well or wells within 200 feet of any building on said premises. The said second parties shall have the privilege of using sufficient water from any creek, branch, lake, or pond on said premises, and if necessary to drill therefor, or make ponds, to run all necessary machinery for drilling and prospecting for oil and gas and operating same.

In case no well be commenced on said premises within one year from date hereof, all rights and obligations secured under this contract shall cease upon notice in writing from the said first parties. Provided, however, that the said second parties shall have the right to continue this lease in force from year to year, until a well is drilled thereon, by paying at any time within ten days from date of the service of said notice, an annual rental of $1.00 per acre for said premises. Said rental to be deposited to the credit of said first parties in Citizens State Bank in Gridley, Kansas, payable quarterly in advance.

The said second parties shall have the exclusive right to erect, lay and maintain upon said premises all pipe, pipe line, machinery and structure necessary for the production, preservation or transportation of Oil and Gas, or either of them, and to remove therefrom such pipes, pipe lines, machinery and other structures. And second parties shall [fol. 8] have the right to discharge any incumbrance on said premises and shall have a lien thereon for the amount so paid, together with all the costs and expenses incurred.

And the said parties of the first part do covenant and agree that at the delivery hereof they are the lawful owners of the premises above granted and seized of a good and indefeasible state of inheritance therein, free and clear of all incumbrance, except a Mortgage of $8000.00.

This Contract Shall extend to and be binding upon the heirs, assigns, successors and personal representatives of the parties hereto. Executed in duplicate the day and year first above written.

Witnesses: Philip Sauder, Annie Sauder, W. A. Moon, J. W. Phillips. (Seal.)

STATE OF KANSAS,
Coffey County, ss:

Be It Remembered, That on this 6th day of June, 1916, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came Philip Sauder, Annie Sauder his wife, W. A. Moon, and J. W. Phillips, who are personally known to me to be the same persons who executed the within instrument of writing, and such persons duly acknowledged the execution of the same.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year last above written. H. C. Hass, Notary Public. My commission expires July 2, 1918. (Seal.)

EXHIBIT B TO PETITION

Gridley, Kansas, June 10, 1926.

Cosden Oil & Gas Co., or Mid-Continent Oil Corporation, Mr. Harry George, Field Supt.

DEAR SIRS: I hereby wish to remind you that the time on your lease dated June 6, 1916, on my farm has expired.

The lease being for ten years or as long thereafter as oil or gas can be found in paying quantities. Now this puts it on a paying basis. Either it pays or it don't.

That is for you to say. If it pays I understand you are [fol. 9] supposed to operate and if it does not pay I understand the lease is run out and I hereby ask you to release it, except that portion which you have operated on and are producing a little oil.

Please let me know what you will do. I believe I am entitled to some action.

Yours truly, Philip Sauder.

EXHIBIT C TO PETITION

Mid-Continent Petroleum Corporation, Formerly Cosden & Company

Tulsa, Okla., June 25, 1925.

Mr. Philip Sauder, Gridley, Kansas.

DEAR SIR: Referring to yours of June 16th, please be advised that we consider we have a paying lease on your farm so will not surrender it.

Mid-Continent Petroleum Corporation, by G. O. Moody.

GOM-w.

IN DISTRICT COURT OF GREENWOOD COUNTY

NOTICE OF PETITION AND BOND FOR REMOVAL—Filed Aug. 25, 1930

To the above-named plaintiff and his attorneys of record:

You, and each of you, will take notice that on the 25th day of August, 1930, at the hour of 4:00 o'clock P. M., the above named defendant, Mid-Continent Petroleum Corporation, a corporation, will file in the above named court its petition and bond, as required by law, for the removal of the above entitled cause from the above entitled court to the District Court of the United States for the District of Kansas, Third Division, and copies of said bond and petition are hereto attached, and upon the filing of said petition and

bond said defendant will present and call to the attention of the District Court of Greenwood County, Kansas, the aforesaid petition and bond, and move said District Court of Greenwood County, Kansas, for an order of removal of said cause from the District Court of Greenwood County, [fol. 10] Kansas, to the District Court of the United States for the District of Kansas, Third Division.

J. C. Denton, J. H. Crocker, R. H. Wills, I. L. Lockewitz, Attorneys for Defendant, Mid-Continent Petroleum Corporation.

The undersigned hereby acknowledge service of the above and foregoing notice, and acknowledge receipt of a copy thereof, and of the petition and bond attached thereto, this 25th day of August, 1930.

W. L. Huggins, Ray Pierson, and Elwin Ware.

[File endorsement omitted.]

IN DISTRICT COURT OF GREENWOOD COUNTY

PETITION FOR REMOVAL.—Filed Aug. 25, 1930

Comes now the Mid-Continent Petroleum Corporation, a corporation, the defendant in the above entitled cause, and respectfully shows to the court:

That the above entitled cause is brought by the above named plaintiff, Philip Sauder, against the above named defendant, Mid-Continent Petroleum Corporation, a corporation, for the cancellation of a part of a certain oil and gas mining lease, entered into by and between the above named plaintiff and the predecessor in title of the above named defendant; that the claim of the above named plaintiff is fully stated and contained in the petition filed herein, and which said petition is hereby referred to and made a part hereof; that the portion of the lease the above named plaintiff seeks to cancel, set aside and hold for naught is of the fair cash value of the sum of Thirty-four Hundred Dollars ($3,400.00); that said cause is wholly of a civil nature at law, and that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (3,000.00).

That the controversy herein is between citizens of different states; that the plaintiff, Philip Sauder, was at the time of the commencement of this suit, and still is, a citizen and [fol. 11] resident of the State of Kansas, residing in Greenwood County, in said State, and that your petitioner, Mid-Continent Petroleum Corporation, a corporation, was at the time of the commencement of said suit, and still is, a foreign corporation, and a non-resident of the State of Kansas, and was then, and still is, a corporation duly formed, created and organized under and by virtue of the laws of the State of Delaware, having its principal office and place of business in the City of Wilmington, in said State of Delaware.

That the time within which said defendant, Mid-Continent Petroleum Corporation, is required by the laws of the State of Kansas, and the rules and practice of this court to answer or plead in this action has not expired, and that said defendant makes and files herewith a bond in the sum of Five Hundred Dollars ($500.00), with good and sufficient surety, for its entering in the United States District Court for the District of Kansas, Third Division, within thirty (30) days of the filing of this petition, a copy of the record in this suit, and for paying all costs that may be awarded by said United States District Court for the District of Kansas, Third Division, if it should hold that this suit is wrongfully or improperly removed thereto.

Wherefore, said defendant, Mid-Continent Petroleum Corporation, prays this court to proceed no further herein, except to accept this petition and to approve said bond, and make an order removing this cause to the United States District Court for the District of Kansas, Third Division, and requiring said defendant to enter and file a copy of the record herein in the United States District Court for the District of Kansas, Third Division, as required by law.

J. C. Denton, J. H. Crocker, R. H. Wills, I. L. Lockewitz, Attorneys for Defendant, Mid-Continent Petroleum Corporation.

Duly sworn to by G. O. Moody. Jurat omitted in printing.

[fol. 12] [File endorsement omitted.]

Note re Bond on Removal

Bond on removal in the sum of $500, approved by George J. Benson, Judge, with defendant as principal and New Amsterdam Casualty Company as surety, was filed in the District Court of Greenwood County, Kansas, on Aug. 25, 1930.

In District Court of Greenwood County

Order of Removal—Filed Aug. 29, 1930

This cause coming on for hearing upon the petition and bond of the defendant, Mid-Continent Petroleum Corporation, a corporation, for an order transferring this cause to the United States District Court for the District of Kansas, Third Division, and it appearing to the court that said defendant has filed its petition for such removal in due form of law, and that said defendant has filed its bond duly conditioned, with good and sufficient surety, as provided by law, and that said defendant has given the above named plaintiff due and legal notice thereof; and it appearing to this court that this is a proper cause for removal to said District Court.

Now, Therefore, Said petition and bond are hereby accepted, and it is hereby ordered and adjudged that this cause be, and it is hereby removed to the United States District Court for the District of Kansas, Third Division, and the clerk of this court is hereby directed to make up the record of said cause for transmission to said court forthwith.

Done this 29 day of August, 1930.

George J. Benson, Judge of the District Court of Greenwood County, Kansas.

[File endorsement omitted.]

[fol. 13] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, THIRD DIVISION

ORDER REVIVING ACTION—Filed May 4, 1931

Now on this 4th day of May, 1931, being a regular day of the May 1931 session of said court, comes on to be heard the motion filed in the above entitled case to revive said action in the name of the Administratrix and the heirs at law of Philip Sauder, plaintiff herein, now deceased.

Plaintiffs appeared by W. L. Huggins and Ray S. Pierson, their attorneys, and the defendant appeared by Hudson & Hudson and R. H. Wills, its attorneys.

Thereupon, the matter is presented to the court and the court finds that the said Philip Sauder, plaintiff herein, died intestate on or about the 4th day of February, 1931, at his home in Greenwood County, Kansas; and the court further finds that said Philip Sauder left surviving him his widow, Annie Sauder, and his daughters, Alice Elsie Strahm, Sophie E. Elrod, Lillian F. Pinon and Emma M. Meagher, all of whom are more than twenty-one years of age, and he also left surviving him his sons, George D. Sauder, Chester A. Sauder, Oliver J. Sauder and Harold W. Sauder, all of whom are more than twenty-one years of age. The court further finds that the said Philip Sauder left surviving him his daughter, Lorene I. Sauder, a minor, 17 years of age. The court further finds that the said Philip Sauder left surviving him Grace Annabell Sauder, Everett Alvin Sauder, Ray Arthur Sauder and Irene Evelyn Sauder, minor grandchildren of the said Philip Sauder and children of the said Philip Sauder's son, Ralph J. Sauder, now deceased.

The court further finds that the said Annie Sauder, widow, is the duly appointed, qualified and acting administratrix of the estate of the said Philip Sauder. The court further finds that Lorene I. Sauder, minor daughter of Philip Sauder, appears herein by her mother and next friend, the said Annie Sauder. The court further finds that the said minor grand-children above named appear herein by their mother and next friend, Mrs. Mina Sauder. The court further finds that the said minor heirs of the said Philip Sauder, deceased, above named, have no legal guardian.

Thereupon, upon due consideration, the court finds that this action should be revived in the names of said Admin-
[fol. 15] istratrix and said heirs of the said Philip Sauder, deceased.

It is therefore, by the court, ordered that this cause be and it is hereby revived in the names of the said heirs and said Administratrix, and the title of this action hereafter shall be:

Annie Sauder, Administratrix of the Estate of Philip Sauder, Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, Lillian F. Pinon, Emma M. Meagher, George D. Sauder, Chester A. Sauder, Oliver J. Sauder, Harold W. Sauder, Lorene I. Sauder, a minor, by Annie Sauder, her mother and next friend; Grace Annabell Sauder, Everett Alvin Sauder, Ray Arthur Sauder and Irene Evelyn Sauder, minors, by Mina Sauder, their mother and next friend, Plaintiffs, vs. Mid-Continent Petroleum Corporation, a corporation, Defendant.

It is further ordered that said plaintiffs be and they are given and allowed ten days from this date in which to file an amended petition herein, to all and each of which said ruling and order defendant duly excepted. Defendant is granted ten days thereafter in which to plead to such amended petition.

Richard J. Hopkins, Judge of the United States District Court for the District of Kansas, Third Division.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

No. 337-N

ANNIE SAUDER, Administratrix of the Estate of Philip Sauder, Deceased; Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, Lillian F. Pinon, Emma M. Meagher, George D. Sauder, Chester A. Sauder, Oliver J. Sauder, Harold W. Sauder, Lorene I. Sauder, a minor, by Annie Sauder, Her Mother and Next Friend; Grace Annabell

Sauder, Everett Alvin Sauder, Ray Arthur Sauder and Irene Evelyn Sauder, Minors, by Mina Sauder, Their Mother and Next Friend, Plaintiffs,

vs.

Mid-Continent Petroleum Corporation, a Corporation, Defendant

Amended Petition—Filed May 4, 1931

Come now the plaintiffs, above named, and by permission and order of the court file this, their Amended Petition, in the above entitled cause, and for their cause of [fol. 16] action against the defendant above named, allege and show the court:

That Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, George D. Sauder, Chester A. Sauder, Oliver J. Sauder, Harold W. Sauder and Lorene I. Sauder, are bona fide residents of the State of Kansas and their post office address is Gridley, Kansas; that the said Lillian F. Pinon is a bona fide resident of the State of Kansas, and her post office address is Madison, Kansas; that the said Emma M. Meagher is a bona fide resident of the State of Indiana and her post office address is New Haven, Indiana; that the said Grace Annabell Sauder, Everett Alvin Sauder, Ray Arthur Sauder and Irene Evelyn Sauder, minors, are residents of the State of Kansas and their post office address is Burlington, and the said Mina Sauder is a resident of Kansas and her post office address is Burlington, Kansas.

Plaintiffs further allege and show the court that they are the heirs at law and the said Annie Sauder is also the Administratrix of the estate of Philip Sauder; that the said Philip Sauder died intestate at his home in Greenwood County, Kansas, on the 4th day of February, 1931; that at the time of the death of the said Philip Sauder, he was, and for many years prior thereto, had been, the owner of the following described real estate situated in the County of Greenwood and State of Kansas, to-wit:

The East Half and the Southeast Quarter of the Southwest Quarter of Section 16, Township 23, Range 13, containing 360 acres more or less.

Plaintiffs further allege that upon the death of said Philip Sauder as aforesaid, these plaintiffs, under and by

virtue of the laws of descents and distributions of the State of Kansas, immediately became, and they are now, the owners of said real estate in fee simple.

Plaintiffs allege that heretofore and upon the 6th day of June, A. D. 1916, the said Philip Sauder, deceased, made and executed and delivered to W. A. Moon and J. W. Phillips his certain oil and gas lease, in writing, of that date, by the terms of which he leased said land for gas and oil. A copy of said lease is attached hereto, marked Exhibit A, and is hereby made a part of his petition as fully as though written in at this place in full.

[fol. 17] Plaintiffs further allege and show the court that thereafter and upon August 9, 1917, said Moon and Phillips duly assigned said lease to Atlantic Petroleum Corporation, and said assignment is of record in the office of the Register of Deeds of Greenwood County, Kansas, in Book 2 of Assignments at Page 241. That thereafter and upon February 24, 1925, said Atlantic Petroleum Corporation duly assigned said lease to Cosdon & Company and said assignment is of record in the office of said Register of Deeds in Book CC of Miscellaneous records at page 325. That thereafter, but plaintiffs cannot give the exact date, said Cosden & Company became the Mid-Continent Petroleum Corporation, and said Mid-Continent Petroleum Corporation became and is the owner of said lease.

The said Mid-Continent Petroleum Corporation, defendant above named, is a Delaware corporation with its post office and place of business at Tulsa, Oklahoma, and is authorized to do business in the State of Kansas as such corporation.

Plaintiffs further allege and show the court that thereafter and on or about the 1st day of November, 1921, the said defendant, Mid-Continent Petroleum Corporation, completed a well in accordance with the terms of said oil and gas lease Exhibit A, upon the Southeast Quarter of the Southwest Quarter of said Section 16, and that oil and gas were found therein in paying quantities. Said plaintiffs further allege and show the court that thereafter and on or about the 1st day of January, 1922, said defendant, Mid-Continent Petroleum Corporation, completed another well upon said Southeast Quarter of the Southwest Quarter of said Section 16, and found therein oil in paying quantities; that aside from said two wells above described,

during all the years intervening since the date of said lease, no effort has been made and no act performed by said defendant, Mid-Continent Petroleum Corporation, or any other holder or owner of said lease, toward the development of said real estate described above for oil and gas. No well has been drilled, no locations made, no effort whatever has been put forth by said defendant, Mid-Continent Petroleum Corporation, to explore for oil and gas or to develop said land for oil and gas; that on or about the 1st day of January, 1922, for the purpose of pumping the two wells above herein described, the said defendant located [fol. 18] and erected upon said Southeast Quarter of the Southwest Quarter of Section 16, a power plant; that until the year 1927, the exact time the plaintiffs are unable to state, said two wells were pumped by power furnished by said power plant located on said Southeast Quarter of the Southwest Quarter of Section 16, but that thereafter, and about the month of September, 1927, the said defendant, Mid-Continent Petroleum Corporation, removed said power plant and procured power for the pumping of said two wells from an adjacent leasehold operated by said defendant, and is still so procuring power for that purpose.

Plaintiffs further allege that on or about the 11th day of December, 1924, the exact date the plaintiffs cannot state, the said Philip Sauder demanded of the then owners of said lease and predecessors of Mid-Continent Petroleum Corporation, that they proceed with the development and exploration of said real estate above described for gas and oil; that said demand was upon one George, who at the time was District Supt. for the Cosden and Company and The Atlantic Petroleum Corporation, predecessors of said Mid-Continent Petroleum Corporation, in charge of this and other property in Greenwood County, and Woodson County, Kansas. Said Philip Sauder made similar demands at various times from the date of said lease until 1928, on various employees and agent of said holders of said lease, but said plaintiffs are unable to state names or dates.

Plaintiffs further allege and show the court that on the 6th day of June, 1926, the said Philip Sauder wrote a letter to the said defendant, Mid-Continent Petroleum Corporation, calling attention to the fact that no work had been

done toward the exploration or development of any of the property herein described, except said Southeast Quarter of the Southwest Quarter of said Section 16, and demanding that development proceed, and if said Mid-Continent Petroleum Corporation did not intend to develop said land that the said lease should be cancelled by said Mid-Continent Petroleum Corporation. A copy of said letter is hereto attached, marked Exhibit B and made a part of this Amended Petition. That shortly thereafter the said Philip Sauder received a letter from said Mid-Continent Petroleum Corporation, in which the said Mid-Continent Petroleum Corporation stated that it considered said lease a valuable one and that it would not cancel the same. A copy [fol. 19] of said letter is hereto attached marked Exhibit C, and made a part of this Amended Petition. Plaintiffs further allege and show the court that no effort has since that time been made and no act performed toward the development of said leased premises or any part thereof.

Plaintiffs further allege and show the court that there is oil development upon land adjacent to the land in question as follows: That on the half section of land immediately east of said half section owned by plaintiffs, there are now 25 producing oil wells, producing oil in good paying quantities; that upon the quarter section of land immediately north of the Northeast Quarter of said Section 16, there is a producing oil well; that upon the North Half of the Southwest Quarter of said Section 16, lying immediately west of plaintiffs' land, there are 3 oil wells, producing oil in paying quantities, and one dry hole has been drilled upon said 80 acres of land; that upon a 40 acre tract of land, being the Southwest Quarter of the Southwest Quarter of said Section 16, there are three producing oil wells and no dry wells; that upon the North Half of Section 21, lying immediately south of the said Section 16, there are 15 producing oil wells producing oil in paying quantities and only one dry hole; that upon the Northwest Quarter of Section 22, lying immediately south and east of said Section 16 and cornering with the plaintiffs' land, there are 12 producing oil wells, producing oil in paying quantities and no dry hole has been drilled upon said property. That from the oil wells upon adjacent land, although none are closer than four hundred feet from plaintiffs' line, several are close enough, that plaintiffs are informed and verily

believe, and therefore allege, that there is grave danger that oil deposits, if any, under the land of these plaintiffs, will be drawn off or depleted by the pumping of oil upon adjacent land; that said oil production upon adjacent land has been going on for a number of years and that no new wells have been drilled upon said adjacent land since the year 1922.

Plaintiffs further allege and show the court that under the terms of said lease it was the duty of the holders thereof and especially of the defendant, Mid-Continent Petroleum Corporation, to fully explore and develop said lands for oil and gas, and plaintiffs allege that during the [fol. 20] past years and ever since June 6, 1916, the said defendant, Mid-Continent Petroleum Corporation, and all of the parties to whom said lease may have been assigned have wholly failed, refused and neglected to develop said land for oil and gas with the single exception of the two wells hereinbefore mentioned on the Southeast Quarter of the Southwest Quarter of said Section 16 and adjacent to the Southwest corner of said Half Section herein described belonging to plaintiffs; that no effort whatever has been made to explore the east half of said Section 16; that the said defendant, Mid-Continent Petroleum Corporation, although repeatedly requested and demanded so to do, as hereinbefore stated, has wholly refused and failed to further develop said land for gas and oil.

Plaintiffs further allege that since the year 1922, at least, the development of oil upon land adjacent to the land described herein belonging to plaintiffs has made it practically certain that oil could have been discovered in paying quantities by the drilling of wells upon said East Half of said Section 16, but that notwithstanding said fact, the said defendant, Mid-Continent Petroleum Corporation, has refused to develop said land and has held the same for speculative purposes and that by reason of such refusal said defendant, Mid-Continent Petroleum Corporation, in equity and good conscience, has forfeited its right to further hold said lease and should be by this court, adjudged and decreed to be wholly in default of its obligations under the terms of said lease, and said lease should be by the court cancelled, set aside and held for naught as to all of said land described herein, with the possible exception of land immediately adjacent to the two wells heretofore de-

scribed lying and situate in the South part of the Southeast Quarter of the Southwest Quarter of said Section 16.

Plaintiffs further allege that unless said lease be cancelled by this court, said defendant, Mid-Continent Petroleum Corporation, will continue to hold said lease for speculative purposes and thereby plaintiffs will be deprived of the very objects, purposes, and things which were the consideration for the execution of said oil and gas lease in the first instance.

Wherefore, The premises considered, plaintiffs pray for a judgment and decree of this honorable court, cancelling said lease and that said lease be cancelled, set aside and [fol. 21] held for naught as to all of said lands, except such portion of said Southeast Quarter of the Southwest Quarter of Section 16, immediately adjacent to said two wells described in the petition herein, as the court may designate and plaintiffs pray that they have such other, further and additional relief as they may be entitled to receive in equity and good conscience, including their costs herein expended.

W. L. Huggins, Ray S. Pierson, Attorneys for Plaintiffs.

Exhibit A omitted here, being identical with Exhibit A on page 6 of this record.

Exhibit B omitted here, being identical with Exhibit B on page 8 of this record.

Exhibit C omitted here, being identical with Exhibit C on page 9 of this record.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Nov. 30, 1931

Comes now the defendant, Mid-Continent Petroleum Corporation, a corporation, and for its answer to the amended petition of the above named plaintiffs, and each of them, states, alleges and denies:

1. That said defendant alleges that the facts stated or attempted to be stated in the amended petition of the above

named plaintiffs are insufficient to constitute a valid cause of action in favor of said plaintiffs and against said defendant.

2. That said defendant admits that it is a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, and is authorized to transact business in the State of Kansas.

3. That said defendant admits that Philip Sauder died intestate in Greenwood County, Kansas, on the 4th day of February, 1931; admits that at the time of his death he was, subject to the oil and gas lease and leasehold estate hereinafter described, the owner in fee of the real estate and premises involved herein; admits that Annie Sauder [fol. 22] is the administratrix of the estate of the said Philip Sauder, deceased; and admits that the above named plaintiffs, Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, Lillian F. Pinon, Emma M. Meagher, George D. Sauder, Chester A. Sauder, Oliver J. Sauder, Harold W. Sauder, Lorene I. Sauder, a minor, Grace Annabell Sauder, a minor, Everett Alvin Sauder, a minor, Ray Arthur Sauder, a minor, and Irene Evelyn Sauder, a minor, are the sole and only heirs at law of Philip Sauder, deceased.

4. That said defendant admits that the aforesaid Philip Sauder, together with Annie Sauder, his wife, on June 6, 1916, made, executed and delivered to W. A. Moon and J. W. Phillips an oil and gas mining lease covering the real estate and premises involved herein, and further admits that said oil and gas mining lease was by mesne assignments sold and transferred to said defendant, and that said defendant is now the owner and holder thereof.

5. That said defendant admits that in accordance with the terms and provisions of the above mentioned and described oil and gas mining lease said defendant, or its predecessors in title, drilled and completed two producing oil wells on a portion of the real estate involved herein, said oil wells being located on the Southeast Quarter ($SE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section Sixteen (16), Township Twenty-three (23), Range Thirteen (13) in Greenwood County, Kansas; admits that oil in paying quantities was discovered in each of said wells; and admits

that it has drilled no other or additional wells on the real estate and premises involved herein.

6. That with reference to that paragraph of plaintiffs' said amended petition beginning with the words: "Plaintiffs further allege and show to the court that there is oil development upon lands adjacent to the land in question," etc., and ending with the words: "adjacent land since the year 1922," said defendant states and alleges that it is without sufficient knowledge or information to admit or deny the allegations of said paragraph of said amended petition, save and except as is herein expressly and specifically admitted or denied.

7. That said defendant admits that there have been and are now certain producing oil wells in the immediate [fol. 23] vicinity of the real estate and premises involved herein, but denies that any of said wells are within 400 feet of the boundary lines of the real estate and premises involved herein, except certain wells offsetting the two above described wells on the real estate and premises involved herein, and as to such wells which are within 400 feet of the boundary lines of the real estate and premises involved herein, and each of them, said defendant states and alleges that it has properly offset the same by drilling, completing and operating the two aforesaid oil wells which are located on the real estate and premises involved herein. That said defendant further denies that any of the oil wells in the immediate vicinity of the real estate and premises involved herein have drained or are draining, or are likely to drain, any of the oil or gas underneath the surface of the real estate and premises involved herein, and alleges that said defendant and its predecessors in title have in all respects complied with all of the express and implied terms, covenants and provisions of the aforesaid oil and gas mining lease, and that said lease is now, and has at all times been, a good, valid and subsisting oil and gas mining lease on the real estate and premises involved herein, and each and every part thereof, and that said defendant is entitled to possession of said real estate and premises, and each and every part thereof, for the purposes of said lease.

8. That said defendant further alleges and states that the oil wells located upon the real estate and premises involved herein, and each and all of the oil wells that have

been drilled in the immediate vicinity of said real estate and premises, are small producers, and that most, if not all, of such oil wells have not produced sufficient, and probably will never produce sufficient oil and gas to pay for the cost of drilling, equipping and operating the same.

9. That said defendant further alleges and states that it has properly offset all wells upon the premises adjoining the real estate and premises involved herein which it was required to offset under the express or implied terms, covenants and provisions of the above mentioned and described oil and gas mining lease, and that it has drilled as many oil wells upon said real estate and premises as under the circumstances could be reasonably expected of operators of ordinary prudence, taking into consideration the cost of drilling, cost of material, operating expenses and [fol. 24] market conditions, and having regard to the interests of both the lessor and lessee.

10. That said defendant further states and alleges that it is without information or knowledge as to whether or not the aforesaid Philip Sauder on December 11, 1924, or any other time or times, made any demand or demands upon its predecessors in title, or any of them, to further develop the real estate and premises involved herein for oil or gas, or to offset any well or wells upon adjoining premises, as is alleged in plaintiffs' said amended petition, and therefore is not able to admit or deny the same.

11. That said defendant denies that the aforesaid Philip Sauder, or the above named plaintiffs, or any of them, has or have ever made any demand or demands upon it, or any of its agents, servants or employees, to further develop the real estate and premises involved herein for oil or gas, or to offset any well or wells upon adjoining premises, as is alleged in plaintiff's amended petition, and said defendant denies that on or about the 11th day of December, 1924, one George was its agent, servant or employee.

12. That said defendant admits that the aforesaid Philip Sauder wrote said defendant under date of June 16th, 1926, the letter, a copy of which is attached to plaintiff's amended petition, marked Exhibit B and made a part thereof, and that under date of June 25th, 1926, said defendant replied to said letter and that a copy of said reply

is attached to plaintiffs' amended petition, marked Exhibit C and made a part thereof.

13. That said defendant denies that it has forfeited any of its rights under the above mentioned and described oil and gas mining lease, or that it is holding the same for speculative purposes, but alleges and states that it and its predecessors in title have complied with each and all of the express and implied terms, conditions and covenants of said lease; that the two above mentioned and described wells upon the real estate and premises involved herein are now producing, and have at all times since their completion produced oil in paying quantities; and that said lease is now, and has at all times been, in full force and effect, and that said defendant is the absolute owner and holder thereof, and is entitled to the possession of the real [fol. 25] estate and premises covered by said lease, and each and every part thereof, for the purposes of said lease.

Wherefore, Said defendant prays that said plaintiffs take nothing by their suit, and that the same be dismissed, and that the defendant have judgment for its costs herein, and such other and further relief as may be just and equitable.

Hudson & Hudson, J. C. Denton, R. H. Wills, J. H. Crocker, I. L. Lockewitz, J. P. Greve, Attorneys for Defendant.

[File endorsement omitted.]

REPLY—Filed Dec. 10, 1931

Come now the plaintiffs above named and each of them and for their reply to the answer of the defendant filed herein, say:

Plaintiffs deny each and every allegation, matter and thing in said answer contained which is in any way contradictory to or inconsistent with the averments contained in the amended petition of said plaintiffs filed herein.

Wherefore, Plaintiffs pray as in their said Amended Petition.

W. L. Huggins, Ray S. Pierson, Attorneys for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 16, 1932

Comes now the above named defendant, Mid-Continent Petroleum Corporation, and respectfully requests the court to make the following findings of fact and conclusions of law, to-wit:

Findings of Fact

1. That on the 6th day of June, 1916, Philip Sauder and [fol. 26] Annie Sauder, his wife, being then and there the owners in fee simple of the

East Half (E½) and the Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of Section Sixteen (16), Township Twenty-three (23), Range Thirteen (13), containing 260 acres, more or less,

for a good and valuable consideration, made, executed, acknowledged and delivered to W. A. Moon and J. W. Phillips an oil and gas lease upon said real estate and premises; that on the 4th day of November, 1916, said lease was filed for record in the office of the Register of Deeds of Greenwood County, Kansas, and recorded in Book 3 of the Oil and Gas Records at page 440; and that a true and correct copy of said lease is attached to the plaintiffs' amended petition, marked Exhibit A and made a part thereof.

2. That at and prior to the date of the commencement of this action the above named defendant, by mesne assignments, was the absolute owner and holder of said oil and gas mining lease and was in possession of the above described real estate and premises under and by virtue of said lease, and is now and has been at all times since the commencement of this action in such possession.

3. That on the 4th day of February, 1931, the aforesaid Philip Sauder, who was the original plaintiff herein, died intestate in Greenwood County, Kansas, and that at the time of his death he was, subject to the oil and gas leasehold estate herein described, the owner in fee simple of the real estate and premises involved herein; that the above named plaintiff, Annie Sauder, is the administratrix of the estate of the said Philip Sauder, deceased; and that the

above named plaintiffs, Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, Lillian F. Pinon, Emma M. Meagher, George D. Sauder, Chester A. Sauder, Oliver J. Sauder, Harold W. Sauder, Lorene I. Sauder, a minor, Grace Annabell Sauder, a minor, Everett Alvin Sauder, a minor, Ray Arthur Sauder, a minor, and Irene Evelyn Sauder, a minor, are the sole and only heirs of the said Philip Sauder, deceased.

4. That within ten (10) years from the date of the execution, acknowledgment and delivery of the aforesaid oil and gas mining lease the defendant, Mid-Continent Petro-[fol. 27] leum Corporation, or its predecessors in title, drilled and completed two oil wells upon the above described real estate and premises, and that such wells were drilled under and by virtue and pursuant to the terms, conditions and provisions of said lease; that oil was discovered in each of said wells in paying quantities; and that at all times subsequent to the drilling and completion of said two wells the defendant, Mid-Continent Petroleum Corporation, or its predecessors in title, have produced oil in paying quantities from each of said wells under and by virtue of the aforesaid lease, and said defendant, Mid-Continent Petroleum Corporation, is now producing oil in paying quantities from each of said wells under and by virtue of said lease.

5. That there have been and are now certain producing oil wells in the immediate vicinity of the real estate and premises involved herein, but none of said wells are within 400 feet of the boundary lines of the real estate and premises involved herein, except certain wells offsetting the two above described wells on the real estate and premises involved herein; that as to such wells as are within 400 feet of the boundary lines of the real estate and premises involved herein, and each of them, said defendant has properly offset the same by drilling and completing and operating the two aforesaid oil wells which are located upon the real estate and premises involved herein; and that none of the oil wells in the immediate vicinity of the real estate and premises involved herein drain or are draining or are likely to drain any oil and gas from underneath the surface of the real estate and premises involved herein.

6. That none of the wells upon any of the real estate and premises adjoining the real estate and premises involved herein is an offset well save and except the certain wells which offset the two above described wells on the real estate and premises involved herein.

7. That the above named defendant and those from and under whom it claims have diligently operated and developed the above described real estate and premises for oil and gas purposes and have fully and completely performed all of their express and implied obligations under and by virtue of the above described oil and gas mining lease.

8. That the defendant, Mid-Continent Petroleum Cor- [fol. 28] poration and its predecessors in title have drilled as many wells upon the real estate and premises involved herein as could be reasonably expected of an oil and gas operator of ordinary prudence and that no oil or gas operator of ordinary prudence would have drilled any additional well upon said real estate and premises.

9. That the above named defendant, nor any of those from and under whom it claims, has abandoned any part of the above described oil and gas lease, or any part of the premises covered thereby.

10. That prior to the commencement of this action neither the above named Philip Sauder nor the above named plaintiffs, or any of them, made any demand or demands upon the defendant, Mid-Continent Petroleum Corporation, or any of its predecessors in title, to drill any well or wells upon the real estate and premises, involved herein in addition to the two wells drillled thereon, or to further develop said real estate and premises for oil or gas.

11. That the court finds each and all of the other issues of fact involved herein in favor of the above named defendant and against the above named plaintiffs.

Conclusions of Law

1. That the defendant, Mid-Continent Petroleum Corporation, is the absolute owner and holder of the above mentioned and described oil and gas mining lease, and that said oil and gas mining lease is a good, valid and subsisting oil and gas mining lease and is in full force and effect as to each and every part of the 360 acres of land covered

thereby, and that said defendant is entitled to the possession of said 360 acres and each and every part thereof under and by virtue of said lease and for the purposes thereof.

2. That the plaintiffs are not entitled to the cancellation of the above mentioned and described oil and gas mining lease, or any part thereof, or insofar as the same covers any portion of the 360 acres of land above described.

3. That the evidence herein is wholly insufficient to entitle the plaintiffs to any judgment whatsoever against the defendant, and that the defendant is entitled to judgment herein.

4. That the court finds each and all the other issues of law [fol. 29] involved herein in favor of the defendant and against the plaintiffs.

Hudson & Hudson, J. C. Denton, R. H. Wills, J. H. Crocker, I. L. Lockewitz, J. P. Greve, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Plaintiffs' Request for Findings of Fact and Conclusions of Law—Filed June 2, 1932

Come now the above named plaintiffs and respectfully request the court to make the following findings of fact and conclusions of law, to-wit:

Findings of Fact

1. That on the 6th day of June, 1916, Philip Sauder and Annie Sauder, his wife, being then and there the owners in fee simple of the

East Half (E½) and the Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of Section Sixteen (16), Township Twenty-three (23), Range Thirteen (13) containing 360 acres, more or less, Greenwood County, Kansas,

for a good and valuable consideration, made, executed, acknowledged and delivered to W. A. Moon and J. W. Phillips an oil and gas lease upon said real estate and premises; that

on the 4th day of November, 1916, said lease was filed for record in the office of the Register of Deeds of Greenwood County, Kansas, and recorded in Book 3 of the Oil and Gas Records at page 440; and that a true and correct copy of said lease is attached to the plaintiffs' amended petition, marked Exhibit A and made a part thereof.

2. That at and prior to the date of the commencement of this action the above named defendant, by mesne assignments, was the absolute owner and holder of said oil and gas mining lease.

3. That on the 4th day of February, 1931, the aforesaid [fol. 30] Philip Sauder, who was the original plaintiff herein, died intestate in Greenwood County, Kansas, and that at the time of his death he was, subject to the oil and gas leasehold estate herein described, the owner in fee simple of the real estate and premises involved herein; that the above named plaintiff, Annie Sauder, is the administratrix of the estate of the said Philip Sauder, deceased; and that the above named plaintiffs, Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, Lillian E. Pinon, Emma M. Meagher, George D. Sauder, Chester A. Sauder, Oliver J. Sauder, Harold W. Sauder, Lorene I. Sauder, a minor, Grace Annabell Sauder, a minor, Everett Alvin Sauder, a minor, Ray Arthur Sauder, a minor, and Irene Evelyn Sauder, a minor, are the sole and only heirs of the said Philip Sauder, deceased.

4. That within ten (10) years from the date of the execution, acknowledgment and delivery of the aforesaid oil and gas mining lease the defendant, Mid-Continent Petroleum Corporation, or its predecessors in title, drilled and completed two oil wells upon the above described real estate and premises, and that such wells were drilled as offsets to wells drilled and producing oil on an adjacent leasehold. Said two oil wells were drilled in the southwest quarter of the southeast quarter of the southwest quarter of said section 16 and at the extreme southwest corner of said leasehold; that oil was discovered in each of said wells in paying quantities; and that at all times subsequent to the drilling and completion of said two wells the defendant, Mid-Continent Petroleum Corporation, or its predecessors in title, have produced oil in paying quantities from each of said wells; and said defendant, Mid-Continent Petroleum

Corporation, is now producing oil in small but paying quantities from each of said wells.

5. That there has been oil development on lands adjacent to the real estate herein described, and there are now and since about 1921 and 1922 have been many producing oil wells to the east and south bordering upon the real estate herein described, and to the southwest and the northeast on lands cornering with the lands herein described; that on the half section of land immediately east of the half section described in said lease there are approximately 25 producing oil wells; that upon the half section of land lying immediately south of said section there are approximately [fol. 31] 15 producing oil wells; that upon the quarter section cornering with the half section described in the lease to the south and east thereof there are approximately 12 producing oil wells; that west from the two offset wells drilled by the defendant upon the land described in said lease and upon the southwest quarter of said Section 16 there are three producing oil wells; that on the half section cornering with the half section described in the lease to the northeast there is considerable oil production, but the record does not show the exact amount thereof; that directly north of said Section 16, but at considerable distance, there is oil production, but the evidence does not show the extent thereof.

6. None of the oil wells referred to in Finding No. 5 above are within 400 feet of the property line of the land described in the lease with the exception of wells to the south which have been offset by the two wells drilled upon this property. The defendant introduced the evidence of expert witnesses who testified rather positively that in their judgment none of the production adjacent to the land described in this lease is draining any oil from the plaintiffs' land. These witnesses, however, admitted that they might be mistaken as there was no absolute way of determining the question of drainage except by drilling tests. This evidence as to drainage is not wholly convincing to the court. There is, in the opinion of the court, some probability that damage is being done to this leasehold by drainage upon the adjoining properties.

7. The defendant owns and is operating an oil lease on the south half of the half section lying immediately east of

Section 16 and the lease on the land cornering upon the south half of Section 16 on the southeast, and the lease on the land on the south of said southeast quarter of the southwest quarter of said Section 16 hereinbefore described.

8. On the basis of the oil development and oil production upon adjacent lands, as shown by the evidence herein, plaintiffs contend that a well-defined "trend" of oil producing sand and lime runs in a southwesterly northeasterly direction under and across the land described in said lease. Expert evidence introduced by the defendant tended to prove that no such "trend" exists under and across the land described in said lease, but that on the contrary the oil sand is not to be found under said land and the depth of the [fol. 32] lime under said land, as estimated by Geologists, is so great that the probabilities are no oil would be found in it. On this point the court is unable to determine the facts but finds that no positive evidence having been introduced by either party as to this contention of plaintiffs, that nothing but exploration and positive test by drilling upon said land can settle the controversy as to whether oil and gas in paying quantities can be found upon said land. Neither the defendant nor any of its predecessors in title have drilled any well upon the east half of section 16 but no dry well has been drilled on any of the property covered by this lease.

9. On the 16th day of June, 1926, Philip Sauder, then the owner of the land described in said lease, wrote a letter to the defendant, in substance, calling the attention of the defendant to the expiration of the ten year term of said lease, and that no wells had been drilled except the two wells heretofore mentioned and demanding that the defendant proceed to explore and develop said land by the drilling of additional wells, or in the alternative that the defendant "release" its claim to all of said land except that part upon which the two wells had been drilled and were producing oil. On June 25, 1926, the said defendant replied to said letter from Philip Sauder, in which letter it stated, in substance, that it considered said lease a valuable one and would not surrender the same.

10. No effort has been made by the defendant since said letters toward exploration or development by the drilling of wells or otherwise and the evidence in this case shows that the defendant and its officers and employes have no present

intention of further exploring or developing said lease and no intention ever to further develop said lease unless and until further developments in the immediate vicinity thereof might convince said defendant and its officers and agents that it would pay the defendant to further explore or develop said lease.

11. The court finds each and all of the other issues of fact involved herein in favor of the plaintiffs and against the defendant.

Conclusions of Law

1. Under the facts and circumstances in this case, as shown by the evidence and the record, the plaintiffs have no adequate remedy at law.

[fol. 33] 2. The defendant and its predecessors in title have not in good faith and with reasonable diligence explored and developed the lands described in this lease in accordance with the express and implied covenants of said lease.

3. It would be inequitable and unjust to permit the defendant to hold, keep and retain the leasehold property involved herein without further exploration or development, as said defendant proposes to do, as shown in the pleadings and evidence herein.

4. The plaintiffs, under the evidence, are entitled to a judgment of this court canceling said lease as to all the land described therein except the southwest quarter of the southeast quarter of the southwest quarter of said section 16 upon which the two offset wells heretofore mentioned were drilled and developed by defendant or its predecessors in title.

5. The defendant is entitled to hold and enjoy its leasehold rights upon said ten acres of land described in Conclusion of Law No. 4 herein so long as it produces gas or oil therefrom in paying quantities.

6. The court finds each and all the other issues of law involved herein in favor of the plaintiffs and against the defendant.

Ray S. Pierson, W. L. Huggins, Attorneys for Plaintiffs.

[File endorsement omitted.]

In United States District Court

Memorandum Decision—Filed July 25, 1932

Hopkins, District Judge:

The action is one in Equity to set aside an oil and gas lease because of failure on part of lessee to explore and develop. I find the facts to be substantially as follows:

On June 6, 1916, Philip Sauder and Annie Sauder, his wife, being then and there owners in fee simple of the 260 acres of land in Greenwood County, for a good and valuable consideration, executed and delivered to W. A. Moon and J. W. Phillips an oil and gas lease upon said premises, which lease was duly recorded in the office of the Register [fol. 34] of Deeds of Greenwood County; that a copy thereof was made a part of plaintiffs' amended petition.

That at and prior to the date of the commencement of this action, the above named defendant, by mesne assignments, was the absolute owner and holder of said oil and gas mining lease.

That on the 4th day of February, 1931, the aforesaid Philip Sauder, who was the original plaintiff herein, died intestate in Greenwood County, Kansas, and that at the time of his death he was, subject to the oil and gas leasehold estate herein described, the owner in fee simple of the real estate and premises involved herein; that the above named plaintiff, Annie Sauder, is the administratrix of the estate of the said Philip Sauder, deceased; and that the above named plaintiffs, Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, Lillian F. Pinon, Emma M. Meagher, George D. Sauder, Chester A. Sauder, Oliver J. Sauder, Harold W. Sauder, Lorene I. Sauder, a minor, Grace Annabell Sauder, a minor, Everett Alvin Sauder, a minor, Ray Arthur Sauder, a minor, and Irene Evelyn Sauder, a minor, are the sole and only heirs of the said Philip Sauder, deceased:

That within ten (10) years from the date of the execution, acknowledgment and delivery of the aforesaid oil and gas mining lease the defendant, Mid-Continent Petroleum Corporation, or its predecessors in title, drilled and completed two oil wells upon the above described real estate and premises, and that such wells were drilled as off-sets

to wells drilled and producing oil on an adjacent leasehold. Said two oil wells were drilled in the southwest quarter of the southeast quarter of the southwest quarter of said section Sixteen (16) and at the extreme southwest corner of said leasehold; that oil was discovered in each of said wells in paying quantities; and that at all times subsequent to the drilling and completion of said two wells the defendant, Mid-Continent Petroleum Corporation, or its predecessors in title, have produced oil in paying quantities from each of said wells; and said defendant, Mid-Continent Petroleum Corporation, is now producing oil in small but paying quantities from each of said wells.

That there has been oil development on land adjacent to the real estate herein described, and there are now and since [fol. 35] about 1921 and 1922 have been many producing oil wells to the east and south bordering upon the real estate herein described, and to the southwest and the northeast on lands cornering with the lands herein described; that on the half section of land immediately east of the half section described in said lease there are approximately twenty-five producing oil wells; that upon the half section of land lying immediately south of said section there are approximately fifteen producing oil wells; that upon the quarter section cornering with the half section described in the lease to the south and east thereof there are approximately twelve producing oil wells; that west from the two offset wells drilled by the defendant upon the land described in said lease and upon the southwest quarter of said Section 16 there are three producing oil wells; that on the half section cornering with the half section described in the lease to the northeast there is considerable oil production, but the record does not show the exact amount thereof; that directly north of said Section 16, but at considerable distance, there is oil production, but the evidence does not show the extent thereof.

None of the oil wells referred to in the above finding are within four hundred feet of the property line of the land described in the lease with the exception of wells to the south which have been offset by the two wells drilled upon this property. The defendant introduced the evidence of expert witnesses who testified rather positively that in their judgment none of the production adjacent to the land described in this lease is draining any oil from the plain-

tiff's land. These witnesses, however, admitted that they might be mistaken as there was no absolute way of determining the question of drainage except by drilling tests. This evidence as to drainage is not wholly convincing to the court. There is, in the opinion of the court, some probability that damage is being done to this leasehold by drainage upon the adjoining properties.

The defendant owns and is operating an oil lease on the south half of the half section lying immediately east of Section Sixteen (16) and the lease on the land cornering upon the south half of Section Sixteen (16) on the southeast, and the lease on the land on the south of said southeast quarter of the southwest quarter of said Section Sixteen (16) hereinbefore described.

[fol. 36] On the basis of the oil development and oil production upon adjacent lands, as shown by the evidence herein, plaintiffs contend that a well-defined "trend" of oil producing sand and lime runs in a southwesterly-northeasterly direction under and across the land described in said lease. Expert evidence introduced by the defendant tended to prove that no such "trend" exists under and across the land described in said lease, but that on the contrary the oil sand is not to be found under said land and the depth of the lime under said land, as estimated by geologists, is so great that the probabilities are no oil would be found in it. On this point the court is unable to determine the facts but finds that no positive evidence having been introduced by either party as to this contention of plaintiffs, that nothing but exploration and positive test by drilling upon said land can settle the controversy as to whether oil and gas in paying quantities can be found upon said land. Neither the defendant nor any of its predecessors in title have drilled any well upon the east half of Section Sixteen (16) but no dry well has been drilled on any of the property covered by said lease.

On the 16th day of June, 1926, Philip Sauder, then the owner of the land described in said lease, wrote a letter to the defendant, in substance, calling the attention of the defendant to the expiration of the ten year term of said lease, and that no wells had been drilled except the two wells heretofore mentioned and demanding that the defendant proceed to explore and develop said land by the drilling of additional wells, or in the alternative that the defendant

"release" its claim to all of said land except that part upon which the two wells had been drilled and were producing oil. On June 25, 1926, the said defendant replied to said letter from Philip Sauder, in which letter it stated, in substance, that it considered said lease a valuable one and would not surrender the same. No effort has been made by the defendant since said letters toward exploration or development by the drilling of wells or otherwise and the evidence in this case shows that the defendant and its officers and employes have no present intention of further exploring or developing said lease and no intention ever to further develop said lease unless and until further developments in the immediate vicinity thereof might convince said defendant and its officers and agents that it would pay the defendant to further explore or develop said lease.

[fol. 37] The court finds each and all of the other issues of fact involved herein in favor of the plaintiffs and against the defendant.

The defendant contends that the decision in this case is controlled by Denker vs. Mid-Continent Petroleum Corporation, 56 Federal (2nd) 725, relying on the theory that the facts in the instant case are so similar to those in the Denker case that the court is bound by its decision. I do not think so. The acreage in the instant case is two and one-fourth times the acreage in the Denker case. The two quarter sections in the instant case have been wholly unexplored and undeveloped. No wells whatever have been drilled on the lease here in controversy for exploration purposes. Two wells only have been put down, because two offset wells were compelled by the drilling of wells on an adjacent tract. In the instant case the defendant holds a lease on the three hundred and sixty acres more than sixteen years old which by its terms expired more than six years ago unless it has been continued in force by the two offset wells. The evidence offered by the defendants indicates no intention to further develop. That is to say, evidence of the defendant tends to show that the land covered by the lease in the instant case is worthless for oil drilling purposes.

In contrast the Denker case involved a lease on one hundred and sixty acres of land. Eight wells were drilled thereon, five of them for exploration purposes, three for offset. It is perfectly apparent that the court in the Den-

ker case believed and found that the defendant company had in good faith explored and developed the leasehold property. I am forced to the conclusion that such has not been true of the defendant in the instant case. In the Denker case it is shown that the developing company expended something over $425,000.00 in development and operation of that quarter section, that the land owner without expenditure on his part had collected as royalty therefrom more than $56,000.00. In the instant case the landlord's receipts for more than sixteen years on the three hundred sixty acres has been less than $10,000.00. If the lease is worthless as contended by defendant it is neither equitable nor just to permit the defendant to continue to hold the lease except upon the ten acres where the two offset wells are located.

[fol. 38] I think the question of the defendant's diligence in exploring the premises is of paramount importance. In Brewster vs. Lanyon Zinc Co., 140 Federal, 801, it is said, "Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business. Whatever, in the circumstances would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee is what is required."

* * * * * * *

"Because forfeitures are usually harsh and oppressive, and because they can ordinarily be enforced at law, courts of equity generally refuse to aid in their enforcement; but the rule is not absolute or inflexible. Its influence and operation do not extend beyond the reasons which underlie it, and in cases, otherwise cognizable in equity there is no insuperable objection to the enforcement of a forfeiture in a court of equity when that is more consonant with the principles or right, justice, and morality, than to withhold equitable relief.

* * * * * * *

See also Huggins, et al., Daley 99 Federal, 606, Logan Natural Gas Co. vs. Great Southern Gas and Oil Co., 126 Federal, 623. In Webbs vs. Croft, 120 Kansas, 657, it is said, "Defendants contend that as they had kept the lease alive by drilling one well during the lease period and had paid the accrued rentals and royalties, the court was not warranted in requiring further development, and that it therefore had read into the contract conditions not stipulated by the parties and had placed burdens on the defendants not contemplated by the contract. Leases of this kind contemplate exploration and development and not the bottling up of land for speculative or other purposes or the postponement of reasonable development, nor yet the limiting of development to an extent merely to prevent a declaration of forfeiture. Although not expressly mentioned in the lease, there is an implied covenant or condition that [fol. 39] there shall be reasonable development and such operation as will protect the interests of both the lessor and lessee."

In McCarney vs. Freel, et al., 121 Kansas, p. 189, it is said, "A lessee may not hold an entire quarter section of land with a single producing well after expiration of term, any more than he may do so before expiration of term. The implied covenant fairly to exhaust capability of the land to produce mineral subsists. If the undeveloped portion of the land will not produce mineral in paying quantities, and the lessee would not be justified in drilling more wells, he may not continue to hold by virtue of a provision in the lease extending the term so long as oil or gas may be produced in paying quantities."

In Brewster vs. Lanyon, supra, the court (page 813) said, "In the absence of some stipulation to that effect, we think an oil and gas lease cannot be said to make the lessee the arbiter of the extent to which, or the diligence with which, the exploration and development shall proceed. The operations contemplated, in the event oil and gas are found in paying quantities, are not to be likened unto a business into which one puts property, money, and labor exclusively his own, the profits and losses in which are of concern only to him, and the conduct of which may be according to his own judgment, however erroneous it may be. By reason of the conditions on which the lease is granted the lessor retains at least a contingent interest in the oil and gas, to the

profitable extraction of which the operations are directed. This interest in the subject of the lease, and the fact that the substantial consideration for the grant lies in the provisions for the payment of royalties in kind and in money on the oil and gas extracted, make the extent to which and the diligence with which the operations are prosecuted of immediate concern to the lessor. If they do not proceed with reasonable diligence, and by reason thereof the oil and gas are diminished or exhausted through the operation of wells on adjoining lands, the lessor loses, not only royalties to which he would otherwise be entitled, but also his contingent interest in the oil and gas which thus passes into the control of others. The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or [fol. 40] the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule in respect of all other contracts where the time, mode, or quality of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases. There can, therefore, be a breach of the covenant for the exercise of reasonable diligence, though the lessee be not guilty of fraud or bad faith."

I am compelled to conclude that the defendant in the instant case has not shown that diligence and exploring and developing the land in question as is required under the law, equity, and good conscience and therefore conclude as a matter of law that:

Conclusions of Law

1. Under the facts and circumstances in this case, as shown by the evidence and the record, the plaintiffs, have no adequate remedy at law.

2. The defendant and its predecessors in title have not in good faith and with reasonable diligence explored and developed the lands described in this lease in accordance with the express and implied covenants of said lease.

3. It would be inequitable and unjust to permit the defendant to hold, keep, and retain the leasehold property involved herein without further exploration or development,

as said defendant proposes to do, as shown in the pleadings and evidence herein.

4. The plaintiffs, under the evidence, are entitled to a judgment of this court canceling said lease as to all the land described therein except the southwest quarter of the southeast quarter of the southwest quarter of said section Sixteen (16) upon which the two offset wells heretofore mentioned were drilled and developed by defendant or its predecessors in title.

5. The defendant is entitled to hold and enjoy its leasehold rights upon said ten acres of land described in Conclusions of Law No. 4 herein so long as it produces gas or oil therefrom in paying quantities.

6. I find each and all the other issues of law involved herein in favor of the plaintiffs and against the defendant, [fol. 41] to all of which findings and conclusions and each, every part thereof the defendant objects and excepts and its exceptions are allowed.

Richard J. Hopkins, Judge.

[File endorsement omitted.]

In United States District Court

Decree—Filed September 15, 1932

Heretofore, on the 8th day of June, 1932, the above entitled cause came regularly on for trial at Kansas City, Kansas, and the above named plaintiffs appeared by their attorneys, W. L. Huggins and Ray S. Pierson, and the above named defendant appeared by its attorneys, Douglas Hudson and R. H. Wills, and the said cause proceeded regularly to trial, and at the close of said trial, on the 9th day of June, 1932, said cause was taken under advisement; and heertofore, to-wit: on the 25th day of July, 1932, the court filed in said cause its memorandum decision; and

Now, on this 14 day of September, 1932, pursuant to the court's aforesaid memorandum decision, It Is Ordered, Adjudged and Decreed that the certain oil and gas lease which was executed by Philip Sauder and Annie Sauder, his wife, to W. A. Moon and to J. W. Phillips, covering the E½ and

the SE¼ of the SW¼ of Section 16, Township 23, Range 13, containing 360 acres, more or less, in Greenwood County, Kansas, and which said lease was filed for record on the 4th day of November, 1916, and recorded in Book 3 of Oil and Gas Records at page 440 of the Records of the Register of Deeds of Greenwood County, Kansas, be and the same is hereby cancelled, set aside and held for naught, save and except insofar as the same covers the following described real estate and premises, to-wit:

That part of the SE¼ of the SW¼ of Section 16, Township 23, Range 13, in Greenwood County, Kansas, described as follows: Beginning at the Southwest corner of the aforesaid SE¼ of the SW¼ of Section 16, Township 23, Range 13, thence East 860 feet along the South line of said SE¼ of the SW¼, thence North 400 feet, thence West 860 feet to the West line of said SE¼ of the SW¼, thence South along said West line 400 feet to the point of beginning.

[fol. 42] It Is Further Ordered, Adjudged and Decreed by the court that as to the real estate and premises last described, to-wit:

That part of the SE¼ of the SW¼ of Section 16, Township 23, Range 13, in Greenwood County, Kansas, described as follows: Beginning at the Southwest corner of the aforesaid SE¼ of the SW¼ of Section 16, Township 23, Range 13, thence East 860 feet along the south line of said SE¼ of the SW¼, thence North 400 feet, thence West 860 feet to the West line of said SE¼ of the SW¼, thence South along said West line 400 feet to the point of beginning,

the above described oil and gas mining lease shall be and continue in full force and effect, as long as oil or gas is produced in paying quantities from said last described real estate and premises.

To the above and foregoing decree, and each and every part thereof, the defendant excepts and its exception is allowed.

Richard J. Hopkins, Judge.

O. K. as to form: W. L. Huggins and Ray S. Pierson, Attorneys for Plaintiffs.

[File endorsement omitted.]

In United States District Court

Decree—Filed October 20, 1932

Heretofore, on the 8th day of June, 1932, the above entitled cause came regularly on for trial at Kansas City, Kansas, and the above named plaintiffs appeared by their attorneys, W. L. Huggins and Ray S. Pierson, and the above named defendant appeared by its attorneys, Douglas Hudson and R. H. Wills, and the said cause proceeded regularly to trial, and at the close of said trial, on the 9th day of June, 1932, said cause was taken under advisement; and heretofore, to-wit: on the 25th day of July, 1932, the court filed in said cause its memorandum decision; and

Now, on this 7th day of October, 1932, pursuant to the court's aforesaid memorandum decision, It Is Ordered, Adjudged and Decreed that the certain oil and gas lease which was executed by Philip Sauder and Annie Sauder, his wife, to W. A. Moon and J. W. Phillips, covering the E½ and the [fol. 43] SE¼ of the SW¼ of Section 16, Township 23, Range 13, containing 360 acres, more or less, in Greenwood County, Kansas, and which said lease was filed for record on the 4th day of November, 1916, and recorded in Book 3 of Oil and Gas Records, at page 440 of the Records of the Register of Deeds of Greenwood County, Kansas, be and the same is hereby cancelled, set aside and held for naught, save and except insofar as the same covers the following described real estate and premises, to-wit:

That part of the SE¼ of the SW¼ of Section 16, Township 23, Range 13, in Greenwood County, Kansas, described as follows: Beginning at the Southwest corner of the aforesaid SE¼ of the SW¼ of Section 16, Township 23, Range 13, thence East 860 feet along the South line of said SE¼ of the SW¼, thence North 400 feet, thence West 860 feet to the West line of said SE¼ of the SW¼, thence South along said West line 400 feet to the point of beginning.

It is further ordered, adjudged and decreed by the court that as to the real estate and premises last-described, to-wit:

That part of the SE¼ of the SW¼ of Section 16, Township 23, Range 13, in Greenwood County, Kansas, described as follows: Beginning at the Southwest corner of the afore-

said SE¼ of the SW¼ of Section 16, Township 23, Range 13, thence East 860 feet along the South line of said SE¼ of the SW¼, thence North 400 feet, thence West 860 feet to the West line of said SE¼ of the SW¼, thence South along said West line 400 feet to the point of beginning.

the above described oil and gas mining lease shall be and continue in full force and effect, as long as oil or gas is produced in paying quantities from said last described real estate and premises.

It is further ordered, adjudged and decreed by the court that the tanks, pipes and equipment now located on the Southeast Quarter of the Southwest Quarter of Section 16, Township 23, Range 13, in Greenwood County, Kansas, at a point approximately 800 feet north of the south line of said above described tract used in the operations of the defendant in connection with the two wells now producing oil and gas upon the above described excepted tract shall be allowed to remain there at their present location unless [fol. 44] the location of said tanks, pipes and equipment shall become obstacles in the development of the lands where said tanks and pipes are located for oil and gas purposes by the plaintiffs, and in that event the defendant shall be required to remove said tanks, pipes and equipment within the limits of the tract of real estate hereby excepted from this decree of cancellation.

To the above and foregoing decree, and each and every part thereof, the defendant excepted and excepts and its exceptions are allowed.

Richard J. Hopkins, Judge.

O. K. as to form: W. L. Huggins, Ray S. Pierson, Attorneys for Plaintiffs. R. H. Wills, Douglas Hudson, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Statement of the Evidence, as Required by Equity Rule No. 75—Filed Nov. 1, 1932

Be it Remembered, That the above entitled cause came regularly on for trial before the court sitting in equity on

the 8th day of June, 1932, upon the issues formed by the pleadings in said cause; Ray S. Pierson, W. L. Huggins and L. W. Reynolds appearing as counsel for the plaintiffs, and R. H. Wills and Douglas Hudson appearing as counsel for the defendant.

STATEMENT OF COUNSEL

Thereupon, counsel for plaintiffs made his opening statement to the court, and in the course thereof stated in substance, among other things, that the action was commenced for the cancellation and forfeiture of an oil and gas lease in what is known as the Gridley oil field; that Phillip Sauder was the owner of the land involved in his lifetime; that he died intestate and that the present plaintiffs were his sole and only heirs at law, and the plaintiff, Annie Sauder, is the duly appointed, qualified and acting administratrix of his estate; that the lease involved herein covers 360 acres of land and was executed by Mr. Sauder to W. A. Moore and J. W. Phillips on the 6th day of June, 1916, for a period of ten years, and as long thereafter as oil or gas was produced from the leased premises in paying quantities; [fol. 45] that thereafter said lease by mesne conveyances became the property of the Mid-Continent Petroleum Corporation, the defendant herein; that there was no development on said lease until 1921, when an offset well was drilled in the southwest corner of said lease, and in 1922 another offset well was drilled in the same part of the leased premises; that the initial production of well No. 1 was 75 barrels per day and the initial production of well No. 2 was 20 barrels per day; that in the plaintiffs' petition we allege that a few days after the ten year term of the lease expired in 1926 Mr. Sauder wrote a letter to the Mid-Continent Petroleum Corporation, in which he demanded that something be done about it, and he called its attention to the fact that the ten year term had expired and it had not produced anything except the two little offset wells, and stated that if it was not going to produce, he wanted it to release the lease; and that the Mid-Continent Petroleum Corporation admits that it received said letter and it replied that it regarded the lease valuable and would not release it and made no promise of development; and that there was nothing in defendant's answer that promised development or anything of that kind; that no rentals

had been paid under the terms of the lease since the drilling of the first well in 1921 and that from 1921 until the present time the wells had decreased in production so that the income from the wells was very far below what the rental of $1.00 per acre would be if the defendant paid that.

Counsel for plaintiffs also stated:

"Now, I think the evidence will show there is good reason to believe that this is oil bearing land, because of the development around it which will be shown by this map and I will not take time now to go into that. However, the evidence will also show that in this field there are spots where there is oil and also spots where there is not oil and it is a field where it is impossible to tell whether a development of this lease would have yielded profits or would not have, and it is one of those cases where it is impossible to establish by geology, because it is too speculative, and the only resort we have is to cancel the lease and there is no adequate remedy except a cancellation that we know of."

[fol. 46] STATEMENT OF COUNSEL.

Thereupon counsel for defendant made his opening statement to the court, and in the course thereof stated:

"Our position is this: That the Mid-Continent Petroleum Corporation and its predecessors have complied with both the express and implied obligations of this lease, both with reference to drilling of the offset wells, and also with reference to further development. That being true, and oil still being produced in paying quantities, we say the lease is still in full force and effect. * * *"

Counsel for the defendant further stated:

"The answer in this case admits most of their allegations and there is just the one question, as I see it, whether or not, under the existing circumstances, there was any obligations for us to drill an additional well or wells and of course, evidence as to that has to be put on."

Counsel for the defendant further stated:

"My notion is this, that they have to establish by their proof that there was or has been a breach, of either the

expressed or implied obligation to drill an additional w
If they don't do that, why, under the terms of the le
and the law, the lease continues as long as the lease p
duces in paying quantities and when it ceases to prod
in paying quantities, it is, ipso facto, at an end."

STIPULATION RE LESSOR'S TOTAL RECEIPTS

Thereupon it was stipulated by and between the part
that the lessors total receipts under the lease involv
which represented 1/8th of the total amount of oil produ
from and under said lease was $766.50 for the year 19
$658.45 for the year 1928; $623.90 for the year 19
$495.45 for the year 1930; $239.23 for the year 1931; a
for the year 1932 up to the date of trial an average of $21
or $22.00 per month.

Thereupon plaintiffs introduced in evidence their Exhi
No. 1, which it was admitted shows the wells drilled up
the lands involved herein, and the lands surrounding sa
the location of said wells, date of drilling, depth and init
production thereof. The same was admitted without
jection.

Thereupon counsel for the plaintiffs stated to the cou

"The evidence will show, if you want it, that all t
[fol. 47] field in Greenwood County, that the producti
after three or four years goes down very rapidly."

STIPULATION RE DEFENDANT'S EXHIBITS "A", "B" AND "C

Thereupon it was stipulated that defendant's Exhib
A, B and C might be considered in evidence, and that t
same were substantially correct statements of the pres
amount of oil and water being produced from each of t
wells upon the following leases:

Howell & Shaffer lease covering the Northwest Quart
(NW1/4) of Section Fifteen (15), Township Twenty-thr
(23), Range Thirteen (13);

Q. M. Shadel lease, covering the Southwest Quar
(SW1/4) of Section Fifteen (15), Township Twenty-thr
(23), Range Thirteen (13);

Phillip Sauder lease, being the lease involved in the case at bar;

Florence Oil Company lease, covering the West Half (W½) of the Southwest Quarter (SW¼) and the Northeast Quarter (NE¼) of the Southwest Quarter (SW1/2) of Section Sixteen (16), Township Twenty-three (23), Range Thirteen (13);

Wells Nos. 2 and 4 on the Viola M. Griblin-A lease, covering the Northwest Quarter (NW¼) of Section Twenty-one (21), Township Twenty-three (23), Range Thirteen (13); and

Theta Oil Company lease, covering the West Half (W½) of Section Ten (10), Township Twenty-three (23), Range Thirteen (13):

that said figures represented the daily average for approximately fifteen days prior to the date of said statements; and that there was a well being drilled at the time of the trial of the case at bar one-half mile north and 700 feet east of the east line of the involved property, and that said well was down at that time about 1,100 feet.

Thereupon the plaintiffs rested.

DEMURRER TO PLAINTIFFS' EVIDENCE

Thereupon the defendant demurred to the plaintiffs' evidence for the reason that it wholly failed to establish a [fol. 48] cause of action in favor of the plaintiffs, or any of them, against the defendant; the ruling upon which was held in abeyance by the court.

Thereupon GEORGE O. MOODY was called as a witness on behalf of the defendant, and testified on direct examination as follows:

That he was Vice-President in charge of production of oil and gas for the defendant, Mid-Continent Petroleum Corporation, and had been engaged in the oil and gas business about 32 years, in the development and operation of oil and gas of wells in Pennsylvania, West Virginia, Illinois, Kansas, Texas, Oklahoma, Borneo, Rumania and

Sumatra; that he was engaged in such business in Kansas and Oklahoma for a short time in 1906 and came back in 1916 and had been engaged in such business in both Kansas and Oklahoma continuously since 1916; that he was familiar with the lease involved herein; that the total revenue in oil produced from said lease down to the 31st day of December, 1931, and accruing to the lease operator, representing 7/8ths of all the oil produced, was $72,694.18; that the royalty paid to the lessors in said lease was between $9,000.00 and $10,000.00, or 1/7th of the aforesaid sum; that up to the present time there had been a total expenditure of $46,464.97 in connection with the drilling, equipping and operation of the two wells on said lease; that down to the first day of January, 1932, said lease had shown a profit to the Mid-Continent Petroleum Corporation of $26,229.21, which had been accumulated from the time the aforesaid wells were drilled in 1921 to December 31, 1931; that the average rate of earning produced by said lease, on the basis of the expenditures, was approximately 5.1% per annum; that that return was very small in so far as an oil venture was concerned because in the development for oil and gas the hazards are so great one must plan a larger return on invested capital on account of dry holes which never give any return; that it cost approximately between $15,000.00 and $16,000.00 per well to drill and equip a well in the locality of the lease involved, and that that was the approximate cost of drilling and equipping each of the wells on said lease; that the Mid-Continent Petroleum Corporation owned three leases on property adjacent to the lands covered by the lease involved herein; that it owned what [fol. 49] was known as the Viola M. Griblin-A lease covering the Northwest Quarter (NW¼) of Section 21, Township 23, Range 13, which has been producing since 1921; that the percentage of interest on the expenditures in connection with the development and operation of said lease was approximately 6.8% per annum; that it owned the Viola M. Griblin B lease covering the Northeast Quarter (NE¼) of Section 21, Township 23, Range 13, and that it had drilled one well on said lease; that it owned the Q. M. Shadel lease covering the Southwest Quarter (SW¼) of Section 15, Township 23 South, Range 13 East, which it purchased after production was obtained thereon, and for that reason defendant did not have the complete figures

showing the percentage of profit that had been derived from the operation of said lease; that it had the figures since 1924 or 1925; that the same was also true of the Viola M. Griblin-B lease and the C. M. Shambaugh lease covering the Northwest Quarter (NW¼) of Section 22, and which was also owned by defendant; that the wells located along the east line of the lease involved, and shown on plaintiffs' Exhibit No. 1, were producing from two geological stratas, one called the Bartlesville Sand and the other the Mississippi Lime; that the major portion of said wells were producing from the Bartlesville Sand; that none of said wells to the east of the lease involved was drilled any closer than 660 feet from the east line of the said lease, because as they went west with the locations the oil decreased in volume and the water increased, showing that they were reaching the edge of the pool; that the development to the east demonstrated that the oil producing sand plays out before it reaches the east line of the lease involved; that in his opinion in going west one location from any of the wells east of said lease one could get a dry hole; that in this neighborhood the customary distance between wells is between 500 and 600 feet; that Shaffer and Howell owned the lease covering the Northwest Quarter (NW¼) of Section 15, Township 32, Range 13, and that the Mid-Continent Petroleum Corporation had no interest whatever in said lease; that the closest well on said lease to the east line of the lease involved was well No. 4, which was 660 feet from said line, and that there was sufficient distance between that well and the east line of the lease involved to have drilled an additional well; that is also true of all the wells located along the west side of the Shaffer & [fol. 50] Howell lease and that all the other wells along the west side of the Shaffer & Howell lease were a greater distance from the east line of the lease involved than said well No. 4 in the northwest corner of said lease; that well No. 2 on the Theta Oil Company lease covering the Southeast Quarter (SE¼) of Section 9, Township 23, Range 13, shown on plaintiffs' Exhibit No. 1, was a dry hole; that said well was drilled below 2,200 feet; that the Bartlesville Sand was encountered in this field between 1,500 and 1,600 feet, and that the Mississippi Lime in this locality, from which

some of the wells were producing, was encountered at approximately 1,700 feet, or beneath the Bartlesville Sand; that the Theta Oil Company well No. 2 was drilled to the Mississippi Lime and through the Bartlesville Sand, and that no production was obtained in said well, in either the Bartlesville Sand or the Mississippi Lime; that the well immediately south of the Theta No. 2 on the Northeast Quarter (NE¼) of Section 21, being well No. 1 on the Viola M. Griblin-B lease, was drilled through the Bartlesville Sand to the Mississippi Lime and that the Bartlesville Sand encountered was very broken and in a small amount and no production was obtained in said sand, and that only a very small production was obtained in the Mississippi Lime; that said well has not produced sufficient oil to repay the cost and expense of drilling and equipping it and that it probably never will pay out; that Theta well No. 2 and Viola M. Griblin-B No. 1, which are in a direct north and south line, tend to show that the probabilities are there is no Bartlesville Sand under the lease involved; that the Mid-Continent Petroleum Corporation drilled well No. 1 on the Viola M. Griblin-B lease and that the purpose of drilling that well was because there was a large undeveloped area between the two pools and that it went between the two pools to see whether there was any connection or production between them, and that said well No. 1 on the Viola M. Griblin-B lease gave the information that there was not enough oil to pay; that said well and the history of it had a great deal to do with defendant not having drilled additional wells on the lease involved; that Theta well No. 2 and Viola M. Griblin-B well No. 1, in the first of which no lime oil was found and in the second of which only a very small quantity of lime oil was found, tended to prove there was either no oil or only oil in too small a quantity to pay, in the Mississippi Lime under the lease [fol. 51] involved, and that that had a great deal to do with not drilling additional wells on said lease; that taking the facts shown by the map introduced in evidence as plaintiffs' Exhibit No. 1 into consideration, in his opinion the sand from which the wells east of the lease involved are producing, like the sand in all oil producing areas in that part of Kansas, was a long narrow strip, usually two and not more than three locations wide, and so long and so narrow that it was generally spoken of as a shoestring sand; that

one usually got better results by drilling in the middle of that line of sand, and by going either east or west one usually got smaller wells; that all of the wells which had been drilled to the west of the lease involved were producing from the Mississippi Lime and that all of said wells were drilled through the Bartlesville Sand, or where the Bartlesville Sand is ordinarily encountered, but that none of said wells west of the lease involved ever produced from the Bartlesville Sand; that well No. 1 on the lease involved is located in the extreme southwest corner of said lease and the initial production of said well was approximately 75 barrels; that well No. 2 was to the east of well No. 1, and that the initial production of said well was approximately 20 barrels; that that indicated that if defendant had extended the development further east it would have gotten a dry hole; that taking into consideration the development both upon the lease involved and upon all surrounding leases, both east and west and north and south, the cost of drilling and equipping a well in that locality and the probability of encountering paying production, and all other available facts, it was his opinion that no prudent operator would have drilled another well on the lease involved; that the Mid-Continent Petroleum Corporation had never abandoned any portion of the lease involved and had never intended to abandon any portion of it, and that if the future should prove it practical to drill another well on said lease the Mid-Continent Petroleum Corporation was capable and willing to drill it; that there was a dry hole on the Florence Oil Company lease in the Southwest Quarter (SW¼) of the Southwest Quarter (SW¼) of Section 16, just one location from the lease involved; that said well was drilled to the Mississippi Lime and through where the Bartlesville Sand should have been; that there was a dry hole drilled on the East Half (E½) of the Northwest Quarter (NW¼) of Section 16 by the Syndicate Oil Company, and that said well was drilled through where the [fol. 52] Bartlesville Sand should have been and then to the Mississippi Lime, and said hole is a little more than one location from the lease involved; that said wells indicate that it was improbable that oil would be obtained on the lease involved; that the amounts of oil produced from the wells to the east of the lease involved and nearest the east line of said lease were declining rapidly and the

amount of water was increasing; that said wells were making more water than the wells to the east of them; and that that fact indicated that the west edge of the pool from which said wells were producing had probably been reached, and that the wells just east of the east line of the lease involved were edge wells.

On cross-examination the witness testified that it was his contention that the half section of land covered by the lease involved was worthless from the standpoint of future development, unless some future development proved that defendant's present theories were wrong; that the development on said lease makes the lease worth more than $3,000.00, but all that he could testify to was his opinion, formed from practical experience and watching developments; that by future development he meant that if there was any development in the vicinity that showed defendant's present theory of operation was wrong; that if some other company does any drilling in the vicinity, which indicates that there might be oil on the land involved, the defendant would drill an additional well or wells on said land; that the defendant's geological records showed that the lime was high on the Griblin lease where there are several producing oil wells, and that it stops there, but that said records did not show that it was impossible for further development in the northwest corner of the lease involved; that the development around the northwest corner of said lease had not been as thorough as around the edges of it, and that if it was later developed that production could be obtained there the defendant would be perfectly willing to develop further on the lease involved; that before there was any further development on the lease involved the defendant would have to gain further information; that further information would be obtained by geology and drilling to the northwest; that the defendant had no leases to the northwest of the lease involved, but might obtain further information if someone else happened to drill to the northwest of the lease involved; that most of the wells drilled on the surrounding leases owned by the Mid-Continent Petroleum Corporation were drilled before [fol. 53] it acquired the leases; that the leases were developed by the Atlantic Petroleum Corporation and the Ralco Company; that he had forgotten how many wells the Mid-Continent Petroleum Corporation drilled.

The foregoing cross examination consists, in part, of the following questions and answers which are inserted herein at the request of counsel for the plaintiffs:

Q. Then, if your geological record shows the west half is worthless, are you willing to cancel it and use the forty acres?

A. Our geological records show it is not impossible for further development in the northwest corner of the lease.

By the Court: I didn't hear you.

A. The development around the northwest corner of the lease has not been as thorough as around the edges of it and if that is later developed, we would be perfectly willing to develop it.

By the Court: Somebody else would have to develop it?

A. We would have to gain further information than we have.

By the Court: How would you get that?

A. Geology.

By the Court: Your theory and your contention and the purpose of your company, is to hold this lease without any further development, or until somebody else develops something that might indicate to you——(Interruption.)

A. Or we gained further information ourselves.

Thereupon the court took an adjournment until 10:00 A. M., June 9th, 1932, when the trial of the case was resumed, and thereupon George O. Moody, being recalled for further cross-examination, testified as follows:

That the Mid-Continent Petroleum Corporation had no immediate intentions of further developing the lease involved.

On re-direct examination, the witness testified that oil was discovered in paying quantities in each of the two [fol. 54] wells drilled on the lease involved, and that said wells had been operated continuously down to the present time, and were still being operated, and that said wells have at all times produced and are now producing oil in sufficient quantities to produce a profit over and above the cost of operation; that none of said wells located to the

east of said lease is what is known as an "offset well"; that the usual location distance from the line for wells in this locality was approximately 200 feet, and that as a general proposition the distance between the wells was approximately 500 feet or a little more; that none of the wells drilled along the east side of the lease involved was within 500 feet of the east line of said lease, and that there was sufficient space for the location of another well between each of said wells and the east line of said lease; and that if another well was located there there would still be the usual distance between said well and the east line of the said lease.

On re-cross examination the witness testified that if a paying well was drilled within 200 feet of the involved lease the defendant would be compelled to give plaintiffs an offset well; that the reason the Mid-Continent Petroleum Corporation had not drilled closer to the involved lease along the east on the Shadel lease was because it would not get oil in paying quantities; that it had gone west on the Shadel lease as far as it thought it could; that he supposed his theory could be wrong; and that defendant had no immediate intentions of drilling around the involved lease.

Thereupon LLOYD SNYDER, called as a witness on behalf of the defendant, testified, on direct examination, as follows:

That he was employed by the Mid-Continent Petroleum Corporation as District Superintendent of Production in northern Oklahoma and in Kansas, and that he had charge of the involved lease; that he had been Superintendent of Production for the Mid-Continent Petroleum Corporation in this particular locality for thirteen years; that he had been engaged in the drilling of oil wells and operating and producing them for thirty-three years; that his experience for the most part had been in West Virginia, Kansas, Oklahoma and Texas, and that he had been engaged in the oil business in Kansas and Oklahoma for seventeen years; that the power with which the two wells on the involved lease were operated since they were brought in in 1921 and [fol. 55] 1922 was not located on the involved lease, but was

on the Griblin lease to the south of the involved lease; that he was familiar with the wells which had been drilled to the east of the involved lease and that said wells were not close enough to the lease involved to be what are commonly called "offset wells" to said lease; that the closest producing well to the east line of the lease involved is well No. 4 on the Shaffer & Howell lease and it is 660 feet from the east line of the lease involved; that the usual distance between wells in this locality is 460 feet, staying 200 feet from county lines anl lease lines; that some of the locations in this field are 520 feet apart; that the wells to the east of the involved lease are producing from the Bartlesville Sand and that the wells to the west and southwest of said lease are producing from the first break in the Mississippi Lime, which is below the Bartlesville Sand; that there were no wells anywhere around the lease involved on adjoining properties which could be called "offset wells"; that the Mid-Continent Petroleum Corporation owned a lease on the Southwest Quarter (SW¼) of Section 15, the Shadel lease, and that the Ralco Oil Company drilled four wells and one dry hole; that the Mid-Continent Petroleum Corporation had not extended its development further west on the Shadel lease because, in his opinion, and in the opinion of the officials of the Company, no prudent operator would have developed it further west, and that he based his opinion upon the water encroachment and the thickness of the sand; that as they went further west on the shoestring line of sand they developed more water and that was an indication that the producing sand was playing out; that as they went further west the production was smaller and they had been advised that the same was true on the Shaffer & Howell lease to the north of the Shadel lease; that it was his opinion that it would not have been profitable to have drilled an additional well on any portion of the involved lease and that if additional wells had been drilled on said lease oil or gas would not have been discovered in such quantities as to have repaid the total outlay, together with a reasonable profit on that outlay, and that in his opinion no prudent operator would have drilled an additional well on the involved lease; that as they drilled the wells on the Shadel lease the center line of wells had a thicker body of sand and more production, and that as they went either east or west from that center line of wells the sand was

thinner and non-productive to a certain extent; that there [fol. 56] was no oil in the top of it and there was water in the bottom of it; that from these facts, as an operator, it was his opinion that if they had gone another location or half a location west, they would have missed the sand entirely and struck a dry hole; that defendant's well No. 1 on the involved lease showed an initial production of 75 barrels, with a certain thickness of sand, and well No. 2, to the east of it, showed a thin sand and a very small amount of oil, and from those facts he drew the conclusion that if they had gone further east they would get the lime and it would have been non-productive and would not have paid to drill a well; that the Atlantic Petroleum Corporation drilled a well on the Viola M. Griblin-B lease in the Northeast Quarter (NE¼) of Section 21, and that said well was drilled through the sand into the lime; that it did not produce oil in paying quantities, but was still being operated by the Mid-Continent Petroleum Corporation, and in his opinion it would never pay out; that the well drilled immediately north of that well on the Theta Oil Company lease in the Southwest Quarter (SW¼) of Section 9, was a dry hole and was drilled through the sand into the lime; that that well and the Viola M. Griblin-B well to the south had a tendency to show that lime oil did not extend that far west on the involved lease; that the sand was missing in both of said wells; and that shows that in that direct line north and south one could not get paying production either in the sand or in the lime.

On cross-examination the witness testified that there were no offsets to the lease involved except the two wells on the Griblin-A lease and the Florence Oil Company well in Section 16; that in his opinion it would not have been a prudent idea to have drilled any other offset well to the involved lease; that Shaffer & Howell owned a lease to the north of the Shadel lease, and that they had laid back from the line about 660 feet; that the Mid-Continent Petroleum Corporation and the Shaffer & Howell Company did not have and never talked of any agreement to lay back from the line and not give Mr. Sauder an offset well; that Shaffer & Howell used the same theory that prudent operators would have used; that Shaffer & Howell drilled fifteen wells on their lease, and that they have been pumping them ever since they have been drilled; that from the map it

looked as though there was a general trend from the southwest; that it stopped at the involved lease on the southwest and on over to the northeast of the lease involved the trend [fol. 57] goes right on north; that his reason for believing there was no oil on the lease involved between the producing wells to the southwest and those to the northeast of the lease involved was that as the defendant in drilling the wells it had already drilled went west from the trend of the wells to the east of the lease involved, the sand seemed to crop out, and that was also true of the wells in the southwest corner of the lease involved; that there were twenty-five wells drilled on the half section that corners the involved lease on the northeast; that the nine wells on the Viola M. Griblin-A lease were drilled in the Mississippi Lime and that the wells on the Shadel lease were drilled in the Bartlesville Sand and there has been one well on said lease drilled to the Mississippi Lime, which was a dry hole; that said well was drilled through the Bartlesville Sand and was practically dry, and the defendant drilled through to the first break in the Mississippi Lime, which was dry and the well was then plugged and shot in the Bartlesville Sand and made a small producer; that the Mid-Continent Petroleum Corporation did not drill a well to the north of the Sauder No. 1 well because it would have been an offset to a dry hole; that the wells on the lease involved had been pumped ever since they were drilled but that they were not very good now; that the wells in this vicinity had not been producing long enough to determine the average life of the wells; that they had not returned much dividend on the investment; that from a geologist's point of view the apparent trend which came toward the lease involved from the southwest seemed to stop before it reached the lease involved; that defendant had never drilled to find out but that was its theory; that he did not want to tell the court that he could tell where there was oil; that it was possible but not probable that its theory might be wrong; that as a general rule the Bartlesville Sand in the vicinity of the lease involved did not run from the southwest to the northeast; that it was his knowledge as an operator that the apparent trend stopped when it got to the lease involved; that the field ran up to the County line quite a distance north of the lease involved; that for a distance of five miles the only break in the line is on the lease involved;

that it was just as possible for production to stop on the lease involved as at any other place; that the Base lease in Section 5, Township 23, Range 13, produced for eight or nine years but was now abandoned; that the wells produced a great deal of water; that as a rule oil trends did not run [fol. 58] in an exactly straight line; that he believed the well on the Viola M. Griblin-B lease had not paid for operation and that the lease had not paid; that the Cosden Oil Company and the Atlantic Petroleum Company did not drill most of the wells on the Shadel lease; that the defendant drilled six wells and the Ralco Oil Company drilled four wells; that the defendant completed its first well on the Shadel lease on October 11, 1923; that he did not consider that the company that the defendant merged with did most of the developing; that he did not think the ten wells on the Griblin-A lease were drilled by the Atlantic Petroleum Company; that he drilled all of the wells drilled on the Griblin lease after October 14th, 1923; that the defendant had drilled as many wells as other companies; that he did not think that the wells around the lease involved that had been pumping from eight to eleven years were draining oil from under the lease involved; that he did not think there was any producing sand under the lease involved; that even if there was oil under said lease from the location of the wells they would not drain the oil from under it; that the wells around the lease involved might possibly lower the pressure; that whether or not drilling an offset to a producing well would lower the production of a producing well depended on the body of sand it was producing from, and whether it was a small body of sand or a large one; that he would consider the body of sand to the east of the lease involved a very small body of sand; that if there were oil on the lease involved the wells surrounding said lease would necessarily lower the pressure, but that he did not think there was any sand on the lease involved; that he did not consider the defendant had been draining oil from under the lease involved; that for perfect drainage wells were placed 460 feet apart and 200 feet from the lease lines, and that there had been no wells drilled that would drain the lease involved; that he thought there were ten wells drilled on the northeast quarter of Section 22; that there was some lime oil to the east of the property shown on plaintiff's Exhibit 1; that oil had been

produced in Greenwood County for years; that the production from the wells drilled showed that the trend from the southwest stopped abruptly at the southwest corner of the lease involved and began again immediately north of the lease involved; and that the defendant had drilled only two wells on the lease involved.

[fol. 59] On re-direct examination the witness testified that in the 33 years he had been engaged in the oil business he had never heard of any oil field in which the sand did not at some place play out and that he had never heard of any oil sand that didn't have definite limits; that the wells to the southwest of the Sauder lease were producing from the Mississippi Lime, and in drilling said wells no Bartlesville Sand was found; that some of the wells to the northeast were producing from the Bartlesville Sand and some from the Mississippi Lime; and that there was nothing to indicate any connection between the wells to the southwest and those to the northeast of the involved lease.

On re-cross examination, the witness testified that the defendant did not have any wells on the Griblin lease on the Northwest Quarter (NW¼) of Section 21, Township 23, Range 13, drilled in what is called the Burgess Sand; that the Burgess Sand lays between the Bartlesville Sand and the top of the Mississippi Lime; but that said wells were producing from the first break in the Mississippi Lime.

On re-direct examination the witness testified that the first break in the Mississippi Lime is found at a lower depth than where the Burgess Sand is encountered.

L. J. Young, called as a witness on behalf of the defendant, testified, in substance, as follows:

That he was a geologist in the employ of the Mid-Continent Petroleum Corporation and was a graduate of geology at the University of Michigan; that he had been employed as a geologist by the Mid-Continent Petroleum Corporation for 10 years; that he had personally examined the logs of all the wells that had been drilled in the immediate vicinity of the lands involved herein; that he had prepared a map or chart, defendant's Exhibit D, which was

offered in evidence and admitted without objection, showing the location and trend of the sand from which the wells to the east and to the northeast and the southeast of the lands involved were producing. Referring to defendant's said Exhibit D, the witness testified that he had prepared said Exhibit from the well logs of the wells drilled by the various companies on the lands shown on said Exhibit; that a well log was a log made up by the driller drilling the well and turned in to the well owner, which showed all of [fol. 60] the formations encountered; that the general direction of this sand was just a little east of north and it is a very narrow sand; that the red lines on said map extending through the middle of the black lines indicate the crest or the highest point at which the drillers found the sand in drilling the wells and that as you go east from said red lines the sand is encountered at lower depths; that each of said black lines represents a drop of 10 feet; that the log trend was so made that it was a contour map on the top of the Bartlesville Sand and that it showed a dip both to the east and to the west from the center line and showed the sand in a long narrow trend; that said sand was called the Bartlesville Sand and was sometimes referred to as a shoestring trend, and was so called because it was narrow and extended for miles across the country; that the best wells were along the center line and that they decreased on each side as you went either way; that in his opinion, based upon an examination of the logs of the wells, the sand does not extend as far west as the involved lease, and that the 400 foot contour minus 400 feet below sea level takes in nearly all production and if they had gone below that they would have gotten a dry hole; that the map identified as defendant's Exhibit D was drawn solely with reference to the sand that was encountered to the east of the lands involved and had nothing to do with production from the lime; that in some cases when wells are marked dry on said exhibit it means dry only in the Bartlesville Sand; that the upper sand was encountered around 140 feet above the Mississippi Lime and the lower sand about 75 feet above said lime; that the figures on said map were obtained by first running the sea level elevation on all the wells and by taking the depth of the sand as recorded by the driller and subtracting the sea level elevation, which gave the distance below sea level at which the top of the sand was encountered; that said

figures are put on in minus quantities, the least distance below sea level being the higher point; that he had indicated the involved lease on the map by green pencil marks; that a circle with a dash through it on said map represented a dry hole, and a solid black circle represented a producing oil well; that the figures in red ink on some of the wells represented the thickness of the sand, where the well logs showed it; that he had also prepared a map or chart showing the location and trend of the Mississippi Lime in the locality of the involved lease, which was identified as de-[fol. 61] fendant's Exhibit E, and admitted in evidence, without objection; that the black lines on said map were the contour lines on top of the Mississippi Lime and that the map was designed for the purpose of showing the subsurface condition, particularly with reference to the Mississippi Lime, in the locality of the involved lease; that said map was prepared on the basis of the logs of the wells the same as defendant's Exhibit D, and indicated the involved lease in green crayon; that the black circles in ink on said map indicated the producing wells from the first break in the Mississippi Lime and the figures opposite said circles indicate the depth of the wells with reference to sea level; that said figures were greater than on defendant's Exhibit D because the lime lay below the horizon of the Bartlesville Sand; that he indicated the producing wells by a black circle and a dry hole by a circle with a line drawn through it; that he had also shown the location and trend of the Bartlesville Sand on said map by drawing two red lines and that the production from the Bartlesville Sand was within those lines. Referring to wells Nos. 1 and 2 on the involved lease, and well No. 1 on the Florence Oil Company lease to the west of the involved lease, the map shows a dip of 15 feet on the top of the lime between those three wells, going down toward the east or toward well No. 2 on the involved lease; that the dry hole on the Florence Oil Company lease on the Southeast Quarter (SE¼) of the Northwest Quarter (NW¼) of Section 16, was 32 feet lower on the top of the Mississippi Lime than Well No. 1 on the involved lease; that the lime under the involved lease was low and that it dipped in every direction except from the northwest to the southeast; that the production from the Mississippi Lime was obtained where the lime was encountered at high points and that the dry holes were obtained where the lime was en-

countered at the lower points; that in his opinion no paying production could be obtained from the Mississippi Lime at any point on the involved lease other than at the location of the two wells that had been drilled on said lease because the lease lies too low from the top of the Mississippi Lime for production; that he could not see any reason for thinking there was any oil at all on the land covered by said lease; and that the Bartlesville Sand did not extend far enough to the west to come to the Sauder property.

[fol. 62] On cross examination, the witness testified that he arrived at his conclusion by investigation and analysis; that in his testimony he had testified to facts that were developed by the drillers in drilling those wells and had used the logs of the wells made by them and if they had made any mistakes he would have made the same mistakes; that the oil development to the east of the involved lease and the drilling of those wells demonstrate that the sand was getting thinner and that it was going down and that in case it would curve to the west or to the east, where it might again get deeper, the wells away from the center of the sand would not get lower so rapidly; that he knew that from experience; that this particular field, known as the Gridley oil field, covers a good many sections of land and that to the north is what is called the Lamont oil field and that there were very few places in Greenwood County where the sand or trend has been very wide; that there were a good many strips in Greenwood County which were a considerable distance apart; that the oil in the Mississippi Lime where the high areas were ran in trends and that you could determine where the high areas were without boring down, by surface geology; that the surface geology follows the subsurface of the Mississippi Lime very closely; that he had never been on the lease involved; that his calculations shown on defendant's Exhibit D were, as near as he could make them, mathematically accurate; that the oil sand came closer to the involved lease immediately to the east than it did at any other point and that in his opinion the logs made by the drillers would not be inaccurate; that he would not say that the half section owned by plaintiffs was undoubtedly worthless from an oil standpoint, but that every indication they had so far on the geology showed it to be very low; that all of the black lines drawn on defendant's Exhibit E were based on knowledge he had received from the

logs of the wells that had been drilled and that his opinion as to how the Mississippi Lime laid under the involved lease was based upon the wells that had been drilled; that if a well had been drilled in the middle of lease involved he would have got some information he did not now have, and such a well might have changed to some extent Exhibit E; that oil in the Mississippi Lime is found on the highs and along the edges and does not run in trends unless the highs are in trends; that starting at the lower left hand corner of the map and going in a northeasterly direction until you [fol. 63] get to the involved land where the wells stop in the Mississippi Lime, then across the half section involved to the northeast, there was more oil in the Mississippi Lime; that there was nothing to indicate that there was a trend in the Mississippi Lime under the involved lease; that he had drawn a line between Well No. 2 on the involved lease and the half section line, which indicated that the lime would be encountered 10 feet lower there; that 10 feet does not shut out the possibility of obtaining oil, but that it meant a great deal; that the only way to be absolutely certain as to whether there were any high in the lime under the involved half section was by drilling a well; that he did not claim that a geologist could by the methods he had used determine whether there was oil under a certain piece of land and always be right; that he did not know of any cases in Kansas where a geologist had reported unfavorably and some one later got a good oil well; and that he had never condemned any areas as non-productive and afterwards found they were productive.

Thereupon G. O. Moody was recalled as a witness on behalf of the defendant and testified, on direct examination, in substance, that on the Q. M. Shadel lease the Ralco Company drilled four wells and the Mid-Continent Petroleum Company drilled six; on the C. M. Shambaugh lease the Ralco Company drilled eleven wells and the Mid-Continent Petroleum Corporation drilled one; on the Viola M. Griblin—B lease the Ralco Company drilled one well; on the Viola M. Griblin—A lease the Atlantic Petroleum Corporation drilled ten wells; and on the involved lease the Atlantic Petroleum Corporation drilled two wells.

No cross-examination.

Thereupon S. V. Brown was called as a witness on behalf of the defendant, and testified, on direct examination, in substance, as follows:

That he was Superintendent of the Shaffer & Howell Drilling Company, which owned the lease covering the Northwest Quarter (NW¼) of Section 15, Township 23, Range 13, and had been such a little more than ten years; that he had drilled all of the 15 wells on that lease with [fol. 64] the exception of two wells, and that he had drilled quite a number of wells to the north of the involved lease, and had drilled wells Nos. 18 and 2 on the T. F. Snyder lease in the next section, and drilled two wells offsetting those north of Section 15, and had drilled 18 wells in that section, and in the Southeast Quarter (SE¼) of Section 15 he had drilled 2 wells, and in Section 9 he had drilled 5 wells; that since the drilling of the wells on the Shaffer & Howell lease he had had charge of the operation of those wells and had determined the location for all of the wells on the Shaffer & Howell lease, with the exception of the first four wells; that well No. 4 on said lease was the closest well to the east line of the involved lease and that it was located in the northwest corner; that it had an initial production of approximately 60 barrels; that he had to put in 3 inch tubing and had around 300 barrels of water to handle in said well, and that the well now made in the neighborhood of 4 or 5 barrels; that he did not know whether or not the well had paid out, that none of the wells located on the Shaffer & Howell lease was an offset to the involved lease, and that the regular offset distance in this field was 200 feet from the property line; that the majority of operators in this field placed their wells 500 feet apart, but that the wells on the Shaffer & Howell lease were 360 feet apart; that there was room for approximately 5 or 6 locations along the west side of the Shaffer & Howell lease that had not been drilled; that the reason he had not drilled those locations was that the Bartlesville Sand ran through the property from the southeast to the northwest and that he was after sand oil; that they had a lime well in the northeast corner of their lease; that the Theta Oil Company well in Section 9 proved that the Bartlesville Sand did not extend for enough to the west to justify the drilling of those locations; that the trend of the sand on the Shaffer & Howell lease to the east of

the involved lease ran from the southeast to the northwest and that in his opinion there was no Bartlesville Sand on the said lease and that it would be necessary to find lime oil in larger quantities than he had found it to pay for the drilling of a well; that he never figured the lime ran in a trend like the sand and that he didn't think there was any lime oil on the involved lease; that he drilled well No. 7 in the southwest corner of the Shaffer & Howell lease and that it made about 2 barrels in the lime; that in his opinion a reasonably prudent oil man would not drill an [fols. 65 & 66] additional oil well on the involved lease; that the approximate cost of drilling and equipping a well in that locality, either to the Bartlesville Sand or to the Mississippi Lime, would be between $12,000 and $14,000; and that there was no connection at all between the Mid-Continent Petroleum Corporation and his employers and that he had no interest in this case.

On cross examination the witness testified that the closest he had ever drilled to the involved lease on the Shaffer & Howell lease was 660 feet from the line, and that there was no agreement of any kind between Shaffer & Howell and the Mid-Continent Petroleum Corporation; that Shaffer & Howell were pumping all of the wells on their lease, but that well No. 7 would not pay if they did not have the equipment on there; and that they had been pumping oil on the lease for the last ten years.

Thereupon the parties herein stipulated that the County line between Coffey and Greenwood counties was indicated by the figure 3 at the top of defendant's Exhibit E.

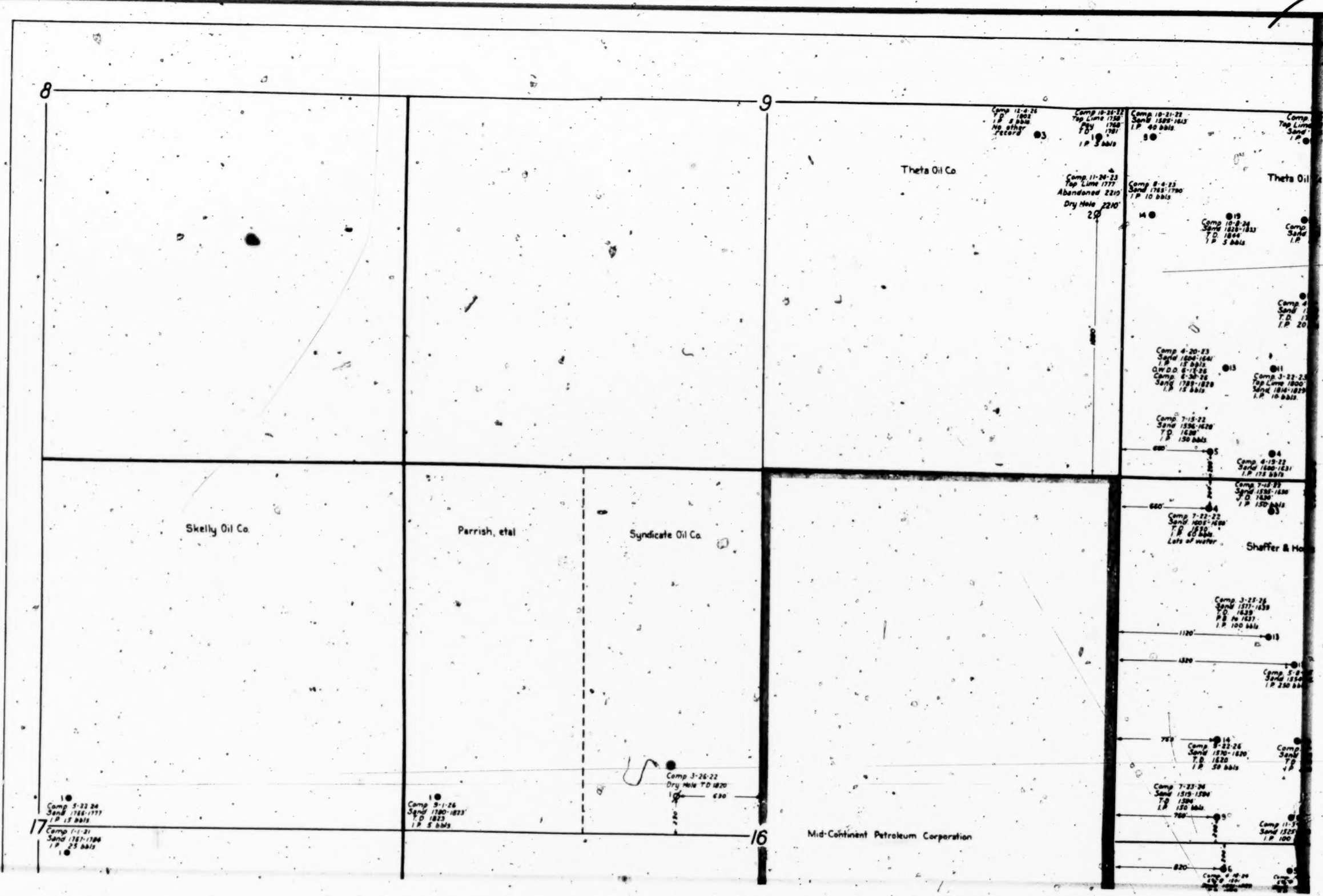
Thereupon the evidence was closed, whereupon the case was taken under advisement by the court.

Plaintiffs' Exhibits

Plaintiffs' Exhibit 1 was a map or plat showing the location of the wells drilled upon the lands in controversy, as well as upon adjoining lands, together with data in connection therewith, which plat or map is as follows:

PLAINTIFFS' EXHIBIT 1

(Here follows Exhibit 1, side folio 67)


8
9
17
16
Skelly Oil Co.
Parrish, etal
Syndicate Oil Co.
Theta Oil Co.
Mid-Continent Petroleum Corporation
Shaffer & Ho
Comp 5-22-26
Sand 1766-1777
I.P. 15 bbls
Comp 1-1-31
Sand 1787-1796
I.P. 25 bbls
Comp 9-1-26
Sand 1780-1823'
T.D. 1823
I.P. 5 bbls
Comp 3-26-22
Dry Hole T.D. 1820
Comp 12-4-26
T.D. 1902
I.P. 5 bbls
No other
Records
Comp 10-25-22
Top Lime 1750
Dry 1768
T.D. 1781
I.P. 3 bbls
Comp 11-24-23
Top Lime 1777
Abandoned 2215'
Dry Hole 2210'
Comp 10-21-22
Sand 1585-1613
I.P. 40 bbls
Comp 8-4-25
Sand 1765-1790
I.P. 10 bbls
Comp 10-2-26
Sand 1828-1833
T.D. 1844
I.P. 5 bbls
Comp 4-20-23
Sand 1604-1641
I.P. 15 bbls
O.W.D.D. 6-17-26
Comp 6-30-26
Sand 1781-1829
I.P. 15 bbls
Comp 3-22-25
Top Lime 1800
Sand 1814-1829
I.P. 10 bbls.
Comp 7-15-22
Sand 1596-1629
T.D. 1638
I.P. 150 bbls
Comp 6-19-22
Sand 1620-1631
I.P. 175 bbls
Comp 7-18-22
Sand 1595-1630
T.D. 1638
I.P. 150 bbls
Comp 7-22-22
Sand 1605-1630
T.D. 1820
I.P. 10 bbls
Lots of water
Comp 3-25-26
Sand 1577-1639
T.D. 1639
P.B. to 1631
I.P. 100 bbls
Comp 9-22-26
Sand 1570-1620
T.D. 1620
I.P. 50 bbls
Comp 7-23-26
Sand 1515-1594
T.D. 1594
I.P. 150 bbls
660'
1120'
1320'
760'
820'

Joint Exhibit #1
6-8-32
W.L.B.

9

10

16

15

Theta Oil Co

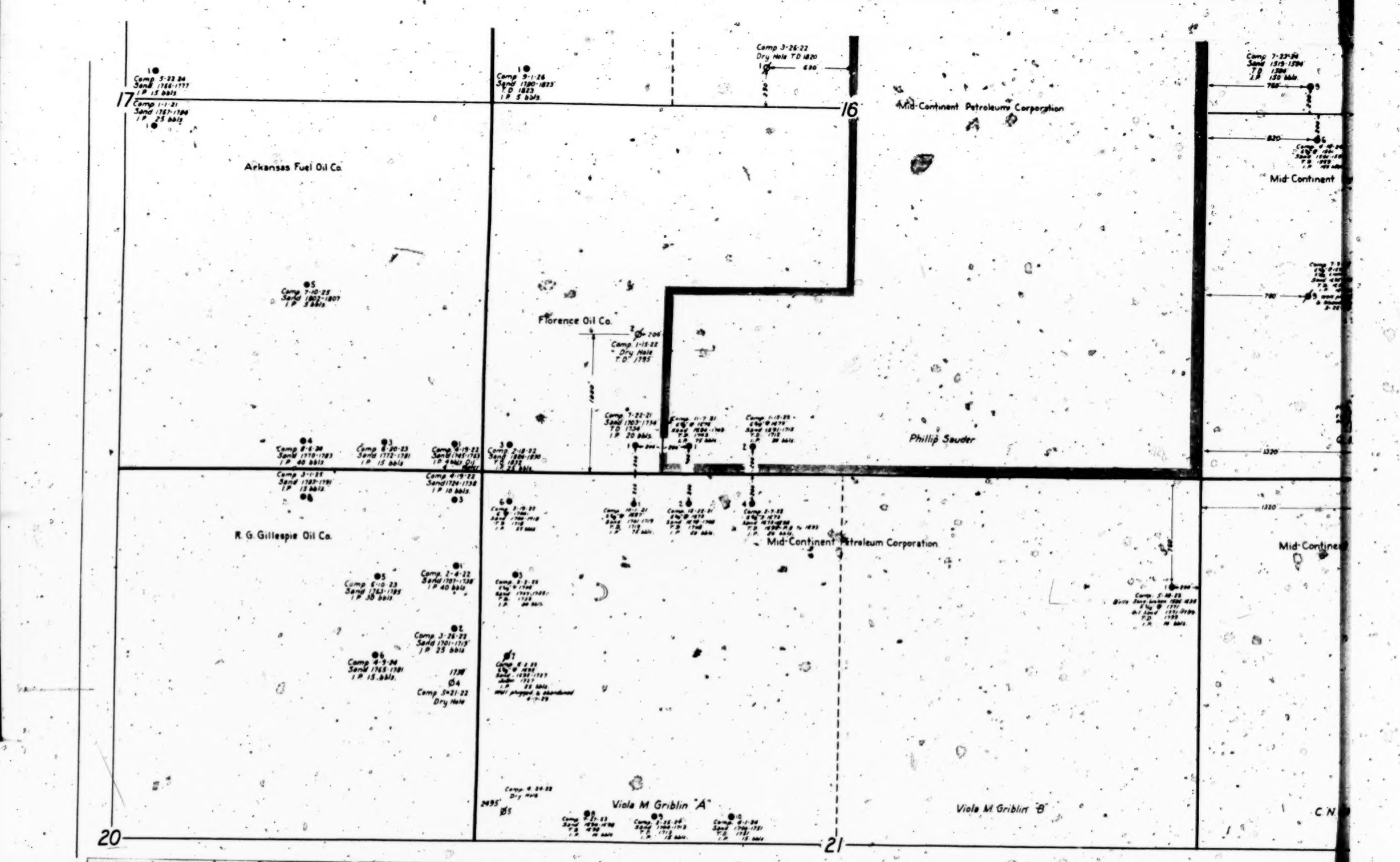
Theta Oil Co

Parrish, etal

Syndicate Oil Co

Shaffer & Howell

Mid-Continent Petroleum Corporation


17
16
20
21
Arkansas Fuel Oil Co.
Florence Oil Co.
Mid-Continent Petroleum Corporation
Phillip Sauder
Mid-Continent
R. G. Gillespie Oil Co.
Mid-Continent Petroleum Corporation
Mid-Continent
Viola M Griblin "A"
Viola M Griblin "B"
Comp 3-26-22
Dry Hole T.D 1820
Comp 9-1-26
Sand 1780-1823'
T.D 1823
I.P. 5 bbls.
Comp 5-22-24
Sand 1766-1777
I.P. 15 bbls
Comp 1-1-21
Sand 1767-1786
I.P. 25 bbls
Comp 7-10-25
Sand 1802-1807
I.P. 5 bbls
Comp 1-15-22
Dry Hole
T.D. 1795'
Comp 7-22-21
Sand 1703-1734
T.D. 1734
I.P. 20 bbls.
Comp 2-18-22
Sand 1786-1830
T.D. 1830
I.P. 24 bbls.
Comp 8-6-24
Sand 1770-1783
I.P. 40 bbls
Comp 8-20-23
Sand 1772-1781
I.P. 15 bbls
Comp 4-19-22
Sand 1745-1763
I.P. 4 bbls Oil
Comp 3-1-25
Sand 1783-1791
I.P. 13 bbls.
Comp 4-19-22
Sand 1724-1738
I.P. 10 bbls.
Comp 2-4-22
Sand 1707-1738
I.P. 40 bbls
Comp 6-10-23
Sand 1763-1785
I.P. 30 bbls
Comp 3-26-22
Sand 1701-1713
I.P. 25 bbls
Comp 6-5-24
Sand 1765-1781
I.P. 15 bbls.
1738'
Comp 5-21-22
Dry Hole
2495'
Comp 7-23-24
Sand 1519-1784
T.D. 1784
I.P. 150 bbls
780
820
1320
C N

16

15

Mid-Continent Petroleum Corporation

Comp 3-26-22
Dry Hole T.D 1820

Comp 9-1-26
Sand 1790-1833
T.D 1833
I.P 5 bbls

Florence Oil Co.

Comp 1-15-22
Dry Hole
T.D 1795

Comp 7-22-21
Sand 1705-1734
T.D 1734
I.P 20 bbls.

Comp 11-7-21

Comp 1-18-22

Phillip Sauder

Comp 7-23-26
Sand 1519-1594
T.D 1594
I.P. 130 bbls.

Comp 11-3-23
Sand 1525-1566
I.P 100 bbls

Comp 6-10-23
Sand 1512-1617
I.P 100 bbls

Mid-Continent Petroleum Corporation

Q. M. Shadel

Comp 6-20-23
Sand 1732-1781
I.P 15 bbls

Comp 4-19-22
Sand 1745-1769
I.P 4 bbls Oil
2 Water

Comp 2-18-22
Sand 1826-1830
T.D 1875
I.P 25 bbls.

Comp 4-19-22
Sand 1724-1738
I.P 10 bbls.

Comp 2-4-22
Sand 1707-1738
I.P 40 bbls

Comp 6-20-23
Sand 1763-1785
I.P 30 bbls

Comp 3-26-22
Sand 1701-1719
I.P 25 bbls

Comp 4-9-24
Sand 1765-1781
I.P 15 bbls.

1738'

Comp 5-21-22
Dry Hole

Mid-Continent Petroleum Corporation

Mid-Continent Petroleum Corporation

Comp 4-20-22
Dry Hole

2495'

Viola M. Griblin "A"

Viola M. Griblin "B"

C. N. Shambaugh "B"

21

22

LEGEND

[fols. 68 & 69] Defendant's Exhibits

DEFENDANT'S EXHIBIT A is as follows:

Arkansas City, Kansas, May 30, 1932.

Mid Continent Petroleum Corp., Tulsa, Okla. c/o Mr. Wills.

DEAR SIR: Herewith find list of wells of the Howell-Shaffer Oil Company. The production of oil and water (daily) also the different formation they are producing from.

Well	Oil Bbls.	Water Bbls.	Formation
1	3	2	Lime
2	5	3	Lime
3	2	4	Lime
4	3	380	Sand
5	2	2	Lime
6	1	3	Sand
7	1	1	Lime
8	6	40	Sand
9	3	60	Sand
10	5	75	Sand
11	3	5	Lime
12	10	80	Sand
13	10	70	Sand
14	3	60	Sand
15	2	4	Lime

Yours truly, Lloyd Snyder.

DEFENDANT'S EXHIBIT B is as follows:

Arkansas City, Kansas, May 26, 1932.

Mid-Continent Petroleum Corp., Tulsa, Oklahoma.

Attention: Mr. Wills

DEAR SIR: Confirming our verbal conversation—herewith find a list of the present production of oil and water on some of our leases adjoining the Phillip Souder lease:

[fol. 70]

Q. M. Shadel	Well	# 1	1 bbl.	Oil	2 bbl.	Water	
	"	# 2	5 bbl.	"	45 "	"	
	"	# 3	10 "	"	40 "	"	
	"	# 4	3 "	"	5 "	"	
	"	# 5	10 "	"	35 "	"	
	"	# 6	5 "	"	100 "	"	
	"	# 7	20 "	"	35 "	"	
	"	# 8	6 "	"	45 "	"	
	"	# 9	Abandoned		Dry hole		
	"	#10	10 "	"	40 "	"	

The production on the Phillip Souder lease is as follows:

Well	# 1	4 bbl.	Oil	6 bbl.	Water	
"	# 2	3 "	"	6 "	"	

The Florence Oil Co., directly West of the Phillips Souder wells produce as follows:

Well	# 1	4 bbl.	Oil	25 bbl.	Water	
"	# 3	4 "	"	50 "	"	

Our 2 offset wells to the Phillip Souder lease on the south

#2	makes	10 bbl.	Oil	15 bbl.	Water	
#4	"	3 "	"	10 "	"	

We will have a prepared list in a few days of the production and sand records of the Howell and Shaffer property which adjoins this Souder lease on the east and north of our Shadel lease.

Yours truly, Lloyd Snyder.

DEFENDANT'S EXHIBIT C is as follows:

Arkansas City, Kansas, June 1, 1932.

Mid-Continent Petroleum Corp., Tulsa, Oklahoma.

Attention: Mr. Wills

DEAR SIR: Herewith find a list of the wells on the East ½ of sec. 10-22-13 on the T. F. Schneider lease of the Theta Oil Co., in Greenwood County, Kansas:

[fols. 71 & 72]

	Oil	Water	Formation
Well # 1	Abandoned		
" # 2	3 bbl.	1 bbl.	Lime
" # 3	1 "	10 "	Sand
" # 4	2 "	½ "	Lime
" # 5	3 "	No	Lime
" # 6	Abandoned		
" # 7	2 "	5 "	Lime
" # 8	2 "	3 "	Sand
" # 9	Abandoned		
" #10	"		
" #11	"		
" #12	4 bbl.	No	Sand
" #13	3 "	9 "	Lime
" #14	1 "	40 "	Lime
" #15	5 "	5 "	Sand
" #16	3 "	2 "	Sand
" #17	15 "	No	Lime
" #18	5 "	5 "	Lime
" #19	1 "	5 "	Lime
" #20	5 "	1 "	Lime
" #21	Abandoned		
" #22	2 "	5 "	Sand
" #23	3 "	3 "	Sand
" #24	2 "	20 "	Sand
" #25	Drilling		

Yours truly, Lloyd Snyder.

Defendant's Exhibit D was a plat or map showing the location of the wells drilled on the property adjoining the involved lease, and which were producing from the Bartlesville Sand, showing the depths at which the sand was encountered and, in some instances, the thickness of the sand, which map or plat is as follows:

(Here follows Exhibit D, side folio 73)

BARTLESVILLE SAND

T.WP.23 S R.13 E

DEFT'S. EX.
NO. D
W.L.B.

13

5 3 2

8 9 10 11

17

15

14

20

21

22

23

[fols. 74-76] Defendant's Exhibit E was a map or plat showing the location of the wells on the involved lease and property adjoining the said lease, which were producing from the Lime, and shows the contour of the Mississippi Lime and the depths at which production was encountered in said lime, which map or plat is as follows: .

(Here follows Exhibit E, side folio 77)

Greenwood Co

T W P. 23 S R. 13 E

Coffey C

6 5 4 3 2

7 8 9 10 11

18 17 16 15 14

Greenwood Co

TWP. 23 S R. 13 E

Coffey Co

72A
77

Top Mississippi Lime

Top Mississippi Lime

[fols. 78 & 79] The above and foregoing is all of the evidence introduced at the trial of said case and is all proceedings in the trial thereof.

Wherefore, the Mid-Continent Petroleum Corporation, defendant and appellant, prays that the above statement of the evidence be settled, approved and allowed by the above entitled court as a true, full, correct and complete statement of all the evidence introduced at the trial of said cause, and all proceedings had at said trial, for use on the appeal taken to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated the 25th day of October, 1932.

R. H. Wills, Douglas Hudson, Attorneys for Defendant and Appellant.

Service of the foregoing proposed statement of the evidence and receipt of a copy thereof this 27th day of October, 1932, is hereby admitted and acknowledged.

W. L. Huggins, Ray S. Pierson, Attorney- for Plaintiffs and Appellees.

STIPULATION RE STATEMENT OF EVIDENCE

It is hereby stipulated that the above and foregoing statement of the evidence is true and correct and may be approved by the Judge without notice.

W. L. Huggins, Ray S. Pierson, Attorney- for Plaintiffs and Appellee-. R. H. Wills, Douglas Hudson, Attorneys for Defendant and Appellant.

ORDER SETTLING STATEMENT OF EVIDENCE

The foregoing statement of evidence is in all respects hereby approved and settled as a true and complete statement of the evidence adduced and all proceedings had on the trial of the above entitled action.

Dated this 2nd day of November, 1932.

Richard J. Hopkins, United States District Judge.

[File endorsement omitted.]

[fol. 80] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Oct. 21, 1932

The above named defendant, Mid-Continent Petroleum Corporation, considering itself aggrieved by the decrees made and entered in the above entitled cause on the 14th day of September, 1932, and on the 7th day of October, 1932, does hereby appeal from said decrees to the United States Circuit Court of Appeals for the Tenth Circuit for the reason specified in the Assignment of Errors which is filed herewith, and it prays that this appeal be allowed and that a *citizen* be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said decrees were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Tenth Circuit under the rules of such court in such cases made and provided.

J. C. Denton, R. H. Wills, J. H. Crocker, I. L. Lockewitz, J. P. Greve, Douglas Hudson, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Oct. 21, 1932

Comes now the Mid-Continent Petroleum Corporation, a corporation, defendant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of its appeal in the above entitled cause from the decrees made by this Honorable court on the 14th day of September, 1932, and on the 7th day of October, 1932:

1. That while said court filed herein a Memorandum Decision containing certain findings of fact and conclusions of law, said court failed to make findings of fact and conclusions of law in the manner and form required by Equity Rule 70½, and said court erred in not making such findings of fact and conclusions of law.

2. That the court erred in finding in its Memorandum Decision that there was, in its opinion, some probability

that damage was being done to the leasehold estate involved herein by draining, through wells upon adjoining proper-
[fol. 81] ties, for the reason that there was no evidence to support such findings, and said finding is contrary to all the evidence.

3. That the court erred in finding in said Memorandum Decision that there was no positive evidence introduced by either party as to the contention of the plaintiffs that there was a well defined trend of oil producing sand and lime running in a southwesterly northeasterly direction over and across the land involved herein, and that nothing but exploration and positive tests by drilling on said land could settle the controversy as to whether oil and gas in paying quantities could be found under said land, for the reason that the defendant did introduce a vast amount of evidence to the effect that there was no sand or lime under said land from which oil or gas in addition to that which was being produced by the defendant could be produced and that there was no likelihood that additional oil or gas could be produced from said land, and there was no evidence to the contrary.

4. That the court erred in finding in said Memorandum Decision that on June 16th, 1926, or any other date, Phillip Sauder made demand upon the defendant, or any of its predecessors in title, to drill any additional well or wells upon the land involved herein, for the reason that there was no evidence to support such finding, and the same is contrary to the evidence.

5. That the court erred in finding in said Memorandum Decision that the defendant had "no intention to further develop said lease unless and until further developments in the immediate vicinity thereof might convince said defendant and its officers that it would pay the defendant to further explore or develop said lease," for the reason that there was no evidence to support such finding, and the same is contrary to the evidence.

6. That the court erred in finding in said Memorandum Decision that "the evidence offered by the defendant indicates no intention to further develop," for the reason that there is no evidence to support such finding, and the same is contrary to the evidence.

7. That the court erred in finding in said Memorandum Decision that the defendant had not in good faith explored and developed the lease involved herein, for the reason that [fol. 82] there was no evidence to support such finding, and the same is contrary to the evidence.

8. That the court erred in finding in said Memorandum Decision that the defendant had not shown diligence in exploring and developing the land involved herein as was required under the law, equity and good conscience, for the reason that there was no evidence to support such finding, and the same is contrary to the evidence.

9. That the court erred in its finding in said Memorandum Decision which reads as follows: "The court finds each and all of the other issues of fact involved herein in favor of the plaintiffs and against the defendant," for the reason that such finding is not in accordance with, nor in the manner and form required by, Equity Rule 70½, and for the further reason that there was no evidence to support such finding, and the same is contrary to the evidence.

10. That the court erred in concluding, as a matter of law, in said Memorandum Decision that the defendant and its predecessors in title had not in good faith and with reasonable diligence explored and developed the lands involved herein in accordance with the express and implied covenants of the lease involved herein, for the reason that there was no evidence to support such conclusion, and the same is contrary to the evidence and contrary to the law.

11. That the court erred in concluding, as a matter of law, in said Memorandum Decision, that "it would be inequitable and unjust to permit the defendant to hold, keep and retain the leasehold property involved herein, without further exploration and development as said defendant proposed to do, as shown in the pleadings and evidence herein," for the reason that there was no evidence to support such conclusion, and the same is contrary to the evidence and contrary to the law.

12. That the court erred in concluding, as a matter of law, in said Memorandum Decision "that the plaintiffs, under the evidence, are entitled to a judgment of this court cancelling said lease as to all the land described therein, except the Southwest Quarter (SW¼) of the Southeast

Quarter (SE¼) of the Southwest Quarter (SW¼) of said Section Sixteen (16), upon which the two aforesaid wells heretofore mentioned were drilled and developed by defend- [fol. 83] ant, or its predecessors in title," for the reason that there was no evidence to supoprt such conclusion, and the same is contrary to the evidence and contrary to the law.

13. That the court erred in concluding, as a matter of law, in said Memorandum Decision that the defendant was only entitled to hold and enjoy its leasehold rights upon the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of said Section Sixteen (16), so long as it produces oil or gas therefrom in paying quantities, for the reason that there was no evidence to support such conclusion, and the same is contrary to the evidence and contrary to the law.

14. That the court erred in its conclusion of law in said Memorandum Decision which reads as follows: "I find each and all the other issues of law involved herein in favor of the plaintiffs and against the defendant," for the reason that such conclusion is not in accordance with, nor in the manner and form required by Equity Rule 70½, and for the further reason that there was no evidence to support such Conclusion, and the same is contrary to the evidence and contrary to the law.

15. That the court erred in not finding each and all of the Findings of Fact requested by the defendant, for the reason that each and all of said Requested Findings were in accordance with the evidence, and there was no evidence to the contrary.

16. That the court erred in not finding, as requested by the defendant, that none of the oil wells in the vicinity of the land involved herein drained, or is draining, or is likely to drain any oil or gas from underneath the surface of the land involved herein, for the reason that such Requested Finding was in accordance with the evidence, and there was no evidence to the contrary.

17. That the court erred in not finding as requested by the defendant, that none of the wells upon any of the land adjoining the land involved herein was an offset well, save and except the certain wells which offset the two wells upon

the land involved herein, for the reason that such Requested Finding was in accordance with the evidence, and there was no evidence to the contrary.

18. That the court erred in not finding, as requested by [fol. 84] the defendant, that the defendant and those from and under whom it claimed had diligently operated and developed the land involved herein for oil and gas purposes, and fully and completely performed all of their express and implied obligations under and by virtue of the oil and gas mining lease involved herein, for the reason that such Requested Finding was in accordance with the evidence, and there was no evidence to the contrary.

19. That the court erred in not finding, as requested by the defendant, that the defendant and its predecessors in title had drilled as many wells upon the land involved herein as could be reasonably expected of an oil and gas operator of ordinary prudence, and that no oil and gas operator of ordinary prudence would have drilled any additional well or wells upon said land for the reason that such Requested Finding was in accordance with the evidence, and there was no evidence to the contrary.

20. That the court erred in not finding, as requested by the defendant, that neither the defendant nor any of those from and under whom it claimed, had abandoned any part of the oil and gas mining lease involved herein or any part of the premises covered thereby, for the reason that such Requested Finding was in accordance with the evidence, and there was no evidence to the contrary.

21. That the court erred in not finding, as requested by the defendant, that prior to the commencement of this action neither Phillip Sauder, nor any of the plaintiffs, or any of them, made any demand or demands upon the defendant, or any of its predecessors in title, to drill any well or wells upon the land involved herein, in addition to the two wells drilled thereon, or to further develop said land for oil and gas, for the reason that such Requested Finding was in accordance with the evidence, and there was no evidence to the contrary.

22. That the court erred in not concluding, as a matter of law, as requested by the defendant, that the defendant was the absolute owner and holder of the oil and gas mining

lease involved herein, and that said oil and gas mining lease was a good, valid and subsisting oil and gas mining lease and was in full force and effect as to each and every part of the 360 acres of land covered thereby, and that said [fol. 85] defendant was entitled to the possession of said 360 acres of land, and each and every part thereof, under and by virtue of said lease and for the purposes thereof, for the reason that such Requested Conclusion was in accordance with the evidence, and there was no evidence to the contrary.

23. That the court erred in not concluding, as a matter of law, as requested by the defendant, that the plaintiffs were not entitled to the cancellation of the oil and gas mining lease involved herein, or any part thereof, or insofar as the same covered any portion of the 360 acres of land involved herein, for the reason that such Requested Conclusion was in accordance with the evidence, and there was no evidence to the contrary.

24. That the court erred in not concluding, as a matter of law, as requested by the defendant, that the evidence was wholly insufficient to entitled the plaintiffs to any judgment whatsoever against the defendant, and that the defendant was entitled to judgment herein, for the reason that such Requested Conclusion was in accordance with the evidence, and there was no evidence to the contrary.

25. That the court erred in overruling the defendant's demurrer to the plaintiffs' evidence, for the reason that said evidence was wholly insufficient to establish a cause of action in favor of the plaintiffs, or any of them, and against the defendant, or to entitle the plaintiffs, or any of them, to any relief whatsoever in equity.

26. That the court erred in not rendering judgment against the plaintiffs, and each of them, and in favor of the defendant, dismissing the plaintiffs' petition and the above entitled cause for want of equity.

27. That the court erred in its final decree made and entered on the 14th day of September, 1932, in cancelling, setting aside and holding for naught the oil and gas lease involved herein, save and except as to that part of the Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of Section 16, Township 23, Range 13, in Greenwood County,

Kansas, described as follows: Beginning at the Southwest corner of the aforesaid SE¼ of the SW¼ of Section 16, Township 23, Range 13, thence East 860 feet along the South line of said SE¼ of the SW¼, thence north 400 feet, thence West 860 feet to the West line of said SE¼ of the [fol. 86] SW¼, thence South along said West line 400 feet to the point of beginning, for the reason that neither the evidence nor the facts found by the court was or were sufficient to justify the same, and that the same was contrary to the evidence and the facts found by the court and also contrary to the law.

28. That the court erred in its final decree made and entered herein, on the 7th day of October, 1932, in cancelling, setting aside and holding for naught the oil and gas lease involved herein, save and except as to that part of the Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of Section 16, Township 23, Range 13, in Greenwood County, Kansas, described as follows: Beginning at the Southwest corner of the aforesaid SE¼ of the SW¼ of Section 16, Township 23, Range 13, thence 860 feet along the South line of said SE¼ of the SW¼, thence North 400 feet, thence West 860 feet to the West line of said SE¼ of the SW¼, thence South along said West line 400 feet to the point of beginning, for the reason that neither the evidence nor the facts found by the court was or were sufficient to justify the same, and that the same was contrary to the evidence and the facts found by the court and also contrary to the law.

29. That the final decree of the court made and entered herein on the 14th day of September, 1932, is not supported by and is contrary to the evidence herein.

30. That the final decree of the court made and entered herein on the 7th day of October, 1932, is not supported by and is contrary to the evidence herein.

31. That the final decree of the court made and entered herein on the 14th day of September, 1932, is contrary to the law.

32. That the final decree of the court made and entered herein on the 7th day of October, 1932, is contrary to the law.

33. That the final decree of the court made and entered herein on the 14th day of September, 1932, is not supported by and is contrary to the facts found by the court herein.

34. That the final decree of the court made and entered herein on the 7th day of October, 1932, is not supported by and is contrary to the facts found by the court herein.

[fol. 87] Wherefore, the defendant, Mid-Continent Petroleum Corporation, prays that said decrees may be reversed, and that said United States District Court for the District of Kansas, Third Division, be ordered to enter a decree reversing its final decrees herein, and upon this appeal complained of, and to make, enter and render a decree dismissing the above entitled cause and the plaintiffs' petition therein for want of equity, and such other and further relief as may be just and equitable.

J. C. Denton, J. H. Crocker, R. H. Wills, I. L. Lockewitz, J. P. Greve, Douglas Hudson, Attorneys for Defendant, Mid-Continent Petroleum Corporation.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Oct. 21, 1932

The petition of the Mid-Continent Petroleum Corporation, defendant in the above entitled cause, for an appeal from the final decrees entered therein on the 14th day of September, 1932, and on the 7th day of October, 1932, is hereby granted and the appeal is allowed, and, upon the petitioner filing a bond in the sum of Three Thousand Dollars ($3,000.00) with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the decrees made and entered in the above entitled cause and shall stay and suspend all future proceedings in this court until the termination of said appeal by the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 21st day of October, 1932.

Geo. T. McDermott, Circuit Judge.

[File endorsement omitted.]

[fol. 88] RECITAL AS TO BOND

Supersedeas and cost bond in the sum of $3,000, approved by Geo. T. McDermott, Circuit Judge, with appellant as principal and New Amsterdam Casualty Company as surety, was filed in the District Court on Oct. 21, 1932.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Oct. 27, 1932

The plaintiffs in the above entitled cause are hereby notified that the defendant herein appeals from the decrees of the court as entered on the 14th day of September, 1932, and on the 7th day of October, 1932. Said appeal will be to the United States Circuit Court of Appeals for the Tenth Circuit, in accordance with the citation as issued in this cause on the 21st day of October, 1932.

J. C. Denton, R. H. Wills, J. H. Crocker, I. L. Lockewifz, J. P. Greve, Douglas Hudson, Attorneys for Defendant.

Service of the above Notice of Appeal accepted this 25th day of October, 1932.

W. L. Huggins, Ray S. Pierson, Attorneys for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 1, 1932

To the Clerk of the above entitled court:

You are hereby requested to make a printed transcript of the record to be filed in the United States Circuit Court of Appeals for the Tenth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in said transcript of the record the following, and no other papers and exhibits, to-wit:

1. Petition filed in the State Court.
2. Petition for Removal.
3. Notice of Petition and Bond for Removal.

[fol. 89] 4. Bond on Removal.

5. Order of Removal.
6. Order Reviving Action.
7. Amended Petition of Plaintiffs.
8. Answer of Defendant.
9. Defendant's Requested Findings of Fact and Conclusions of Law.
10. Plaintiffs' Requested Findings of Fact and Conclusions of Law.
11. Memorandum Decision of the court.
12. Decree of September 14, 1932.
13. Decree of October 7, 1932.
14. Narrative Statement of the Evidence.
15. Petition for Appeal.
16. Order Allowing Appeal.
17. Assignment of Errors.
18. Citation, with service.
19. Supersedeas and Appeal Bond.
20. This Præcipe.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Tenth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, on or before the 29th day of November, 1932.

Dated this 25th day of October, 1932.

J. C. Denton, R. H. Wills, J. H. Crocker, I. L. Lockewitz, J. P. Greve, Douglas Hudson, Attorneys for Appellant.

[fol. 90] Service of the above Præcipe accepted and acknowledged this 27th day of October, 1932.

W. L. Huggins, Ray S. Pierson, Attorneys for Appellees.

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein that the above and foregoing shall constitute the entire record on appeal in the above entitled cause.

Dated this 25th day of October, 1932.

J. C. Denton, R. H. Wills, J. H. Crocker, I. L. Lockewitz, J. P. Greve, Douglas Hudson, Attorneys for Appellant. W. L. Huggins, Ray S. Pierson, Attorneys for Appellee.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 91] Minute entry of argument and submission, June 9, 1933, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, SEPTEMBER TERM, 1933

No. 773

R. H. Wills (J. C. Denton, J. H. Crocker, I. L. Lockewitz and J. P. Greve were with him on the brief) for appellant.
W. L. Huggins and Ray S. Pierson for appellees.

Before Phillips and McDermott, Circuit Judges, and Kennedy, District Judge

OPINION—September 14, 1933

PHILLIPS, Circuit Judge, delivered the opinion of the court:

Philip Sauder brought this suit against the Mid-Continent Petroleum Corporation seeking the cancellation of an oil and gas lease covering the east half, and the southeast quarter of the southwest quarter, Sec. 16, Twp. 23 South, Range 13, Greenwood County, Kansas, as to the undeveloped portion thereof. We shall refer to the land just described as the Sauder lease. During the pendency of the cause, Philip Sauder died, and it was revived in the names of appellees herein, who are all his heirs at law.

The lease was entered into June 6, 1916, and ran from Philip Sauder to Annie Sauder, his wife, to W. A. Moon and J. W. Phillips. It passed through mesne assignments to the Petroleum Corporation. It contained the following provision:

[fol. 92] "That the said parties of the first part * * * do hereby Lease and Let unto the said parties of the second part the exclusive right for Ten Years from date hereof, and as long thereafter as Oil or Gas can be procured thereon in paying quantities, to enter upon, operate for

and procure Oil and Gas upon the following described premises. * * *"

During the primary term of the lease, the predecessors in title to the Petroleum Corporation completed two wells on the southeast quarter of the southwest quarter of Sec. 16. The first well was completed November 1, 1921, and the second January 1, 1922. There has been no further drilling on the Sauder lease.

The only evidence introduced by the appellees was a map showing producing wells situated east of the Sauder lease in Sections 10, 15 and 22, and south and west thereof in Sections 17, 20 and 21. The producing wells nearest to the Sauder lease were: One situated 660 feet east of the east line, one 200 feet west of the west line, and two 200 feet south of the south line. The last mentioned wells were offset by the two wells drilled on the Sauder lease. The wells to the east of the Sauder lease were producing from the Bartlesville sand, and those to the south and west from the Mississippi lime.

The uncontroverted evidence on the part of the Petroleum Corporation established these facts:

The total revenue from the two wells drilled by the predecessors of the Petroleum Corporation, up to December 31, 1931, was $83,079, of which it received seven-eighths, and the Sauders one-eighth as royalty. Up to December 31, 1931, the Sauder lease had yielded to the Petroleum Corporation 5.1% per annum on the cost of the present development.

The Bartlesville sand in the vicinity of the Sauder lease is found in long narrow strips averaging about three well locations in width. The wells are located a distance of about 460 feet apart, and not nearer than 200 feet to the lease lines. The producing area of the strip of Bartlesville sand here involved has been well defined by drilling. Dry holes have been drilled between this producing area and the east line of Sauder lease. Wells along the west edge of the producing area have produced more water and less oil than the wells farther east. The sand along such edge is thinner and is found at greater depths than at [fol. 93] points farther east. Wells drilled north, south, and west of the Sauder lease encountered no production in

the Bartlesville sand. These facts demonstrate that such producing area lies to the east of the Sauder lease.

The wells on the Sauder lease and those to the south and west thereof are producing from the Mississippi lime. The Mississippi lime produces oil at its higher points and is barren of oil at its lower points, that is, the oil is found where the lime is nearer to the surface. The two wells drilled on the Sauder lease, and the wells drilled to the north, west, and south thereof indicate that the lime on this lease dips sharply in every direction toward the Sauder lease, except from the northwest to the southeast, and that the lime is so low on the Sauder lease that probably no oil will be found therein in paying quantities except in the southeast quarter of the southwest quarter. The geologist for the Petroleum Corporation estimated the lime on the undeveloped portion of the Sauder lease to lie at a depth of from 580 to 610 feet below sea level. The wells that encountered the lime at a greater depth than 570 feet below sea level in the vicinity of the Sauder lease, were usually dry holes or produced oil in negligible quantities.

Absence of oil in paying quantities in the Mississippi lime on the Sauder lease is indicated also by the following facts: Four dry holes were drilled near such lease, one in the southeast quarter of Sec. 9, 1880 feet north of the north line and 200 feet west of the east line of the lease, one in the northwest quarter of Sec. 16, 630 feet west of the west line of the lease and 290 feet north of the center of Sec. 16, and one in the southwest quarter of the southwest quarter of Sec. 16, 200 feet west of the west line and 1000 feet north of the south line of the lease. A well in the southwest quarter of section 15, 760 feet east of the east line of the lease, and a well in the northwest quarter of that section were drilled to, and failed to encounter oil in paying quantities in the Mississippi lime. The westerly well drilled on the Sauder lease encountered a thicker lime than the one to the east. The former produced 75 barrels of oil per day, while the production from the latter was slight. The former reached the lime at 558 feet, and the latter reached the lime at 574 feet below sea level.

[fol. 94] Mr. Moody, vice-president of the Petroleum Corporation in charge of production of oil and gas, testified that the geological information indicated that oil and gas

would not be found in paying quantities on the undeveloped portion of the Sauder lease; that such was the opinion of the representatives of the Petroleum Corporation; that if future development or additional geological information should indicate that their opinion was wrong, they would be willing to drill additional wells on such lease; that they had not abandoned such lease, and it was their intention to hold it under the terms of the lease for future development.

The trial court canceled the lease, except as to a small tract in the southeast quarter of the southwest quarter of Sec. 16, surrounding the two producing wells.

In Denker v. Mid-Continent Petr. Corp. (C. C. A. 10) 56 F. (2d) 725, this court said:

"In order to comply with the implied covenants of a lease to drill offset wells and to diligently develop the lease, a lessee must do that which, under the circumstances, an operator of ordinary prudence, having regard to the interests of both lessor and lessee, would do. Brewster v. Lanyon Zinc Co. (C. C. A. 8), 140 F. 801; Pelham Petroleum Co. v. North, 78 Okl. 39, 188 P. 1069, 1072; Goodwin v. Standard Oil Co. (C. C. A. 8) 290 F. 92; Humphreys Oil Co. v. Tatum (C. C. A. 5) 26 F. (2d) 882; Orr v. Comar Oil Co. (C. C. A. 10) 46 F. (2d) 59, 63; 40 C. J. p. 1067, Sec. 684."

This is the rule announced by the great weight of authority. It has been approved by the Kansas decisions. See Webb v. Croft, 120 Kas. 554, 244 Pac. 1033; Howerton v. Kans. Nat. Gas Co., 81 Kas. 553, 106 Pac. 47; Id. 82 Kas. 367, 108 Pac. 813; Day v. Kansas City Pipe Line Co., 82 Kas. 861, 109 Pac. 186.

It has been recently followed in Broswood O. & G. Co. v. Mary O. & G. Co.,—Okl.—, 23 P. (2d) 387, where the court, under a state of facts similar to those in the instant case, refused to cancel the undeveloped portion of an oil and gas lease.

In Webb v. Croft, supra, decided April 10, 1926, the court said:

[fol. 95] "The lease is silent as to the number of wells that shall be drilled on the land, and in such a case there is an implication that there shall be reasonable develop-

ment of the land by drilling such number of wells as an ordinary prudent man would do under the circumstances, taking into consideration the results of the development and whether or not there was sufficient production to warrant the continuance of exploration and drilling."

However, in McCarney v. Freel, 121 Kas. 189, 246 Pac. 500, decided June 12, 1926, after the lease here involved was entered into, the court stated the facts as follows:

"The lease was dated June 15, 1912, and embraced a quarter section of land. The term was for 10 years, and as much longer as oil or gas could be produced in paying quantities. In October, 1912, a well was drilled which produced and still produces oil in paying quantities. In November, 1917, a dry hole was drilled. No further effort has been made to develop the oil and gas resources of the land, although numbers of producing wells have been drilled and are in operation on all the surrounding land. *Plaintiff's evidence warranted the inference that defendants have not reasonably developed her land, and have no present intention to do so.*" (Italics ours.)

And then said:

"A lease may not hold an entire quarter section of land with a single producing well after expiration of term, any more than he may do so before expiration of term. The implied covenant, fairly to exhaust capability of the land to produce mineral, subsists. If the undeveloped portion of the land will not produce mineral in paying quantities, and the lessee would not be justified in drilling more wells, he may not continue to hold by virtue of a provision in the lease extending the term so long as oil or gas be produced in paying quantities."

There must be ground for the cancellation of an oil and gas lease. In the absence of fraud or mistake, there must be a substantial breach of an express or implied covenant of the lease. The burden of proof to establish such a breach was upon the appellees. Goodwin v. Standard Oil Co. (C. C. A. 8) 290 Fed. 92, 98. With respect to development, there is an implied obligation on the part of a lessee to drill [fol. 96] such wells as under the circumstances an operator of ordinary prudence, having regard for the interests of

both the lessor and lessee, would drill. The trial court did not find that the Petroleum Corporation had breached such implied obligation. Indeed, such a finding would have been wholly without support in the evidence.

The trial court's decision in the instant case was predicated on the doctrine announced in McCarney v. Freel, supra. The supreme court in that case said the evidence justified the inference that there was a breach of the covenant to develop. The decree was predicated on that breach. Here, as before stated, there was no breach of any covenant to develop, express or implied. We think it is distinguishable from the instant case.

If the doctrine announced in McCarney v. Freel, supra, is to be applied broadly to a state of facts such as exist in the instant case, it amounts to this: That where, under the existing circumstances and the known geological information, an operator of ordinary prudence having regard to the interests of both lessor and lessee would not drill on a portion of the lease, notwithstanding the provision of the lease that it shall extend to the whole tract as long as oil or gas is produced therefrom in paying quantities, the lessee by failing to drill on such portion forfeits his lease as to that portion. In other words, he must either do that which a prudent operator would not do or forfeit a portion of his lease. The implied covenant to develop imposes no such burden.

Since McCarney v. Freel, supra, was decided long after the date this lease was entered into, while persuasive, it is not binding on us. Kuhn v. Fairmont Coal Co., 215 U. S. 349; Denker v. Mid-Continent Petr. Corp. (C. C. A. 10) 56 F. (2d) 725, 727. It is true that in Day v. Kansas City Pipe Line Co., 87 Kas. 617, 125 Pac. 43, decided July 6, 1912, the Kansas court uttered a dictum which supports McCarney v. Freel, supra. But in the lease there involved, there was an express covenant to "continue drilling as long as paying wells were found or royalties were paid," and there was an express finding that the lessee had not diligently developed the leased premises. It is clearly distinguishable from the instant case, because here there was no breach of the implied covenant to develop, and there is no express covenant in the lease to continue drilling as long [fol. 97] as paying wells are found or royalties are paid.

We are unable to subscribe to the doctrine of McCarney

v. Freel, supra, as construed by the trial court, because in our opinion it either imposes a greater obligation under the implied covenant to develop than is recognized by the great weight of authority, including many Kansas decisions, or it places an obligation on the lessee not imposed by the lease contract, and in effect makes a new contract for the parties.

With much geological information at hand strongly indicating an absence of oil and gas in paying quantities in the undeveloped portion of the Sauder lease, we think it cannot be said that the Petroleum Corporation has done other than what a prudent operator, under the existing circumstances, having regard for the interests of both lessor and lessee, would have done. In view of the long lapse of time since any development has taken place on the lease, the large area undeveloped, and the fact that the lessor is precluded from exploring it himself or through a third person, slight indication that the undeveloped portion contains oil or gas in paying quantities, regard for the interests of the lessee as wall as the lessor, would require further development. But, under the facts as th-y existed hen this suit was tried, we are of the opinion that the etroleum Corporation had violated none of the express or implied covenants of the lease contract. Until it has, or the lease has expired by its terms, it is entitled to continue to hold the whole of the Sauder lease.

The costs will be assessed against appellees and the decree Reversed without prejudice to the bringing of a new suit, in the event changed conditions should indicate a breach of the implied covenant to develop.

Dissenting Opinion

McDermott, Circuit Judge, dissenting:

There are two reasons which lead me to the conclusion that the decree of the trial court should be modified to require the defendant either to drill a well within a reasonable time or surrender the unexplored 320-acre tract.

I

An oil and gas lease in Kansas conveys an interest in real estate. Robinson v. Smalley, 102 Kan. 842. The [fol. 98] rights of a holder of an oil and gas lease are

governed by the decisions of the state court. "These decisions constitute rules of property and must be accepted and applied in passing upon the complainant's rights." Guffey v. Smith, 237 U. S. 101, 113. Unless there is a commanding reason to the contrary, a non-resident should not be permitted to acquire a greater interest in Kansas real estate than a resident may acquire; nor should a sovereign state be denied the power to determine, within constitutional limits, the rights to real estate within its borders. Cities Service Oil Co. v. Roberts (C. C. A. 10) 62 F. (2d) 579.

To this settled rule there is a well recognized and proper exception. If an interest in real estate is acquired in reliance upon a rule of property then settled by state decisions, the federal courts will apply the law as laid down when the interest was acquired.

My understanding is that the genius of this exception lies in the reliance of the purchaser upon a rule of property law settled by the state decisions, and the injustice of denying to him the rights he believed he was acquiring. I do not understand that when a nonresident buys Kansas real estate he is not bound by any later decision of the Supreme Court of that state. A nonresident who sees fit to buy real property in another state ought to take his chances, along with residents, on how the Supreme Court of the state may eventually decide open questions.

Counsel for appellant state that McCarney v. Freel, 121 Kan. 189, "supports the conclusion of the trial court." It does. A lease on 160 acres was made in 1912. The original term had expired. The testimony for the defendant was that a lessee would not be justified in drilling more wells. In that case there was one producing well on 160 acres; in our case, two producers on 360 acres. That lease was less than 13 years old; the lease here was executed 17 years ago. The trial court there, as here, canceled the lease except as to a tract around the producing well. The Supreme Court of Kansas affirmed that decree.

It thus clearly appears that if the lessee of the Sauder lease were a resident of Kansas, the lessor would be entitled to relief. This nonresident lessee is not entitled to a greater right than a resident unless McCarney v. Freel is contrary to a rule of property established by the deci- [fol. 99] sions when the lease was made in 1916. An

examination of the decisions prior to 1916 persuades me that McCarney v. Freel did not overturn any settled rule of property law; but on the contrary finds support in the earlier decisions.

In Mills v. Hart, 77 Kan. 218, 220, 94 P. 142 (1908) the court laid down the general principles underlying mineral lease law as follows:

"The only consideration moving to the lessor for the right which he gave to the lessee to explore and procure minerals was the royalty on the coal to be found and the fixed compensation for each well when gas should be found and utilized, together with sufficient gas to supply two stoves in his farmhouse. If there were no search, nor any product, no possible benefit could come to the lessor for the exclusive rights which had been given to the lessee. It is not easy to infer that the lessor intended to give a valuable right for a nominal consideration, and permit the lessee to retain the right for a period of twenty years without development, when development was the chief purpose in the execution of the lease. Neither the character of the right given nor the nature of the instrument admits of such an irrational interpretation. The lease contemplates that the lessee shall proceed to dig and bore for gas, oil and coal, and that the lessor shall obtain gas for his farmhouse, not twenty years hence, but as soon as it can reasonably be procured."

In the case of Howerton v. Gas Company, 81 Kan. 553 (1910) the court cited and followed Brewster v. Lanyon Zinz Co. (C. C. A. 8) 140 F. 801, 809, 810, which is undoubtedly the leading case on the subject of implied covenants diligently to explore and develop. The primary term of the lease involved in the Brewster case had expired; there was one producing well thereon when the suit to cancel the lease was brought. Justice Van Devanter's entire opinion is illuminating, but the following excerpts are particularly pertinent:

"The implication necessarily arising from these provisions—the intention which they obviously reflect—is that if, at the end of the five-year period prescribed for original exploration and development, oil and gas, one or both, had been found to exist in the demised premises in paying quantities, the work of exploration, development, and produc-

[fol. 100] tion should proceed with reasonable diligence for the common benefit of the parties, or the premises be surrendered to the lessor. * * * The subject was, therefore, rationally left to the implication, necessarily arising in the absence of express stipulation, that the further prosecution of the work should be along such lines as would be reasonably calculated to effectuate the controlling intention of the parties as manifested in the lease, which was to make the extraction of oil and gas from the premises of mutual advantage and profit. * * * Upon both principle and authority it must be held that the present lease contains a covenant by the lessee to continue, with reasonable diligence, the work of exploration, development, and production at the end of the five years, if during that time oil and gas, one or both, are found in paying quantities."

It will be noted that the implied obligation includes that of "exploration." The Supreme Court of Kansas, in the Howerton case, further indicated its conception of the duty of the lessee by the following quotation from the opinion of Justice Lurton in Petroleum Company v. Coal, Coke and Manufacturing Company, 89 Tenn. 381:

"The 'testing' provided for was manifestly a condition upon which the lease depended. If such test showed no minerals, then the contract was at an end; if it, on the other hand, showed the presence of valuable mines, then the lessees were bound to operate them in good faith for the joint profit of themselves and the owners of the fee."

Culbertson v. Cement Co., 87 Kan. 535 (1912) presents a different state of facts and the decision is not pertinent. The following statement of principle has some bearing:

"Since the number of wells to be drilled on the land was not specified there was an implied obligation on appellants to fully develop the land and put down as many wells as were necessary to secure to appellee his proportionate share of the pool of gas. Kleppner v. Lemon, 176 Pa. St. 502, 35 Atl. 109; Thornton, The Law Relating to Oil and Gas, §91."

In Day v. Pipe Line Co., 87 Kan. 617, 623 (1912) there were eight producing wells on two eighty-acre tracts in- [fol. 101] cluded in a single lease covering 600 acres. Al-

though the primary term had not expired, an action was brought to cancel the lease. Relief was granted as to the 440 acres upon which no wells had been drilled. There was an express covenant in that case, not present here, "to continue drilling as long as paying wells are found or royalties paid." The case is therefore distinguishable from the case at bar. The court interpreted the lease to require "that drilling should continue with reasonable diligence as long as paying wells could be found," and then held:

"The appellant was, of course, not required to develop land that had been tested and found to be unprofitable for operation, but if paying wells could not be found on the land or any part of it there is no reason why appellees' title should be longer clouded with a barren encumbrance nor any reason why appellant should resist a cancellation."

These decisions were all before the lease in question was executed. I think they do not conflict with those which follow; nor has the Kansas Supreme Court intimated, in any of the later cases, that there is any conflict between the earlier and later decisions.

Two years after this lease was given, the case of Alford v. Dennis, 102 Kan. 403, 405, (1918), was decided. In 1902 the lessor executed one lease covering two tracts, one of 220 acres and one of 716 acres. There were many producing wells on the larger tract, but no exploration of the smaller. The primary term had expired. The Supreme Court of Kansas held that it "was not the province of the court to end a contract merely because it is a bad bargain"; and that "The plaintiff asks the court to cancel this contract, to decree a forfeiture of it, and not for default of any expressed provision of the contract but merely for default of one of its implied covenants. The instances are rare where equity will enforce a forfeiture. It will never do so where less drastic redress will satisfy the demands of justice." Citing then its earlier decisions, the court said:

"Unless the plaintiff's tract was to be developed some time there was no reason to include it in the lease, and as it stands it is of no value to defendants. Unless the defendants had a bona fide intention to prospect and de- [fol. 102] velop this tract they had no proper purpose in leasing it, and to cancel the lease will do them no injury.

While equity abhors forfeitures it likewise abhors injustice."

A decree was directed that the lease as to the 220-acre tract be canceled unless the lessee prospected and developed the tract within a reasonable time.

In Webb v. Croft, 120 Kan. 654, 657, 658 (1926) the primary term had expired. The lease covered 580 acres and there was one producing well thereon. The closest development to the lease were two wells, each three-fourths of a mile away. The facts were not as favorable to the lessor as the facts here. The trial court entered a decree requiring the lessee to develop or cancel. The Supreme Court affirmed and held, upon authority of its earlier decisions, that:

"Leases of this kind contemplate exploration and development and not the bottling up of land for speculative or other purposes or the postponement of reasonable development, nor yet the limiting of development to an extent merely to prevent a declaration of forfeiture. Although not expressly mentioned in the lease, there is an implied covenant or condition that there shall be reasonable development and such operation as will protect the interests of both the lessor and lessee. Howerton v. Gas Co., 81 Kan. 553, 106 Pac. 47; Id., 82 Kan. 367, 108 Pac. 813; Alford v. Dennis, 102 Kan. 403, 170 Pac. 1005; Harris v. Ohio Oil Co., 57 Ohio St. 118. The lease is silent as to the number of wells that shall be drilled on the land, and in such a case there is an implication that there shall be reasonable development of the land by drilling such number of wells as an ordinarily prudent man would do under the circumstances, taking into consideration the results of the development and whether or not there was sufficient production to warrant the continuance of exploration and drilling. * * * We think the court rightly concluded that the land of defendants has not been sufficiently developed. 'It would be grossly inequitable to hold a tract of 580 acres with no more development than has already been made. Plaintiff was entitled to some remedy for the failure to develop it, and we think it was competent for the Court, instead of decreeing a cancellation of the lease, to give the defendants an opportunity to make reasonable develop-
[fol. 103] ment of the land pursuant to their implied cove-

nants, as has already been determined in Alford v. Dennis, supra."

Then came McCarney v. Freel, squarely in point, and conceded by counsel to support the decree of the trial court.

There are other decisions of the Kansas court, but these appear to be sufficient to demonstrate that there has been no change in the current of Kansas authority from the start; and that either before or after 1916, that court would not permit a lessee to hold 320 acres for 17 years without exploration or development. As I read the decisions of the Kansas court, they adhere to the same general test first announced in Brewster v. Lanyon Zinc Co., supra, and followed by our court in Denker v. Mid-Continent Petroleum Corporation, 56 F. (2d) 725. The difference is that the Kansas court places more emphasis on the phrase "having due regard for the interests of the lessor" than does our court. The interpretation given to a general rule becomes a part of the rule, just as an interpretation of a statute becomes a part of the statute.

If I am right in this analysis of the Kansas decisions, Guffey v. Smith, supra, requires that Kansas law be applied. If I am wrong in my construction of the earlier Kansas decisions, the question was at least an open one except for the dictum in the Day case. Where the question is an open one at the time interests in real estate are acquired, the rights of the parties should be governed by the later decisions of the state court, and not by the still later decisions of the federal court. Why should the rights of these parties be determined by our decision in the Denker case decided in 1932, instead of the decision of the state Supreme Court in the McCarney case decided in 1926?

Forewarned by the earlier decisions and the dictum in the Day case that the Kansas Supreme Court would adhere to the rule that the principal consideration moving to a lessor was the development of his property, and that emphasis would be placed on the lessee's obligation to pay heed to the interest of the lessor, this nonresident came voluntarily to Kansas and acquired this lease. It does no more than to hold it to its bargain to say to it "When you buy Kansas real property, you hold it subject to Kansas law." Unless the McCarney case upset a rule of property law which was settled in 1916—and I can find no basis for [fol. 104] such a claim—there is no reason for according

this nonresident company rights in Kansas property which a resident company would not have acquired under the identical lease.

II

Even if the Kansas decisions are to be ignored, I come to the same conclusion. Since the decision in Brewster v. Lanyon Zinc Company, supra, the test laid down by both the state and federal courts is what a prudent operator, having regard for the interests of the lessor as well as his own, would do. If the phrase "having regard for the interests of the lessor" has any real meaning, I think the defendant ought not to hold 320 acres, almost surrounded by oil wells, without even one test well. The defendant, in common fairness, ought to give these lessors a well or get off and let some one else drill it.

Defendant's testimony is that the geologic inference is unfavorable. But geologic inference is not infallible. This is a spotted field, and its many dry holes give mute and expensive evidence of the fallibility of geology. Even Mr. Moody does not accord verity to his own geologists, for notwithstanding their unfavorable report, he is not willing to relinquish this half section. He frankly says that he wants to hold it because there may be oil under it. Of course that is true, or he would not go to the expense of defending this suit unless he thought enough of the possibilities to warrant the expense.

The truth is that this half section is neither proven nor condemned. No one will ever know whether there is oil under this land until a drill goes down. Mr. Moody says that; his geologists say it; their anxiety to keep it corroborates their statements. Mr. Moody wants some other company to drill on adjoining acreage; in other words, he wants to retain his gamble at the expense of his lessors and adjoining operators.

But geologic inference is not as unfavorable as defendant contends. I lay to one side the wells in the Bartlesville sand, for it appears to have pinched out before reaching this half section. But there are many wells in the Mississippi lime both to the northeast and to the southwest of this tract. The defendant's answer is that the Mississippi lime is too low under this lease to justify exploration. The lime under these 320 acres is from 570 to 610 feet below sea level,

[fol. 105] and much of the south half is between 570 and 590 feet. The map, prepared and introduced by the defendant, shows in the section adjoining on the southwest 23 producing wells where the lime is between 570 and 610 feet below sea level, and nine producing wells higher than 570 feet. It shows 18 producers within the 570-610 range in the field adjoining on the northeast, and three higher than 570 feet. There are dry holes between 590 and 610 feet, but there are dry holes as high as 564 feet. It is true that the wells are more productive on the higher spots in the lime, but there is no ground for condemning that part of this tract where the lime lies between 570 and 590 feet, for that is the bracket within which a large number of the adjoining producers were brought in.

Dry holes have been drilled in this field, two of them to the west of this lease. There are others to the southwest and the northeast, but there are also many producers there. The trend of the sand in the lime is undoubtedly under this lease, and part of it is at the depth where many wells have been brought in. Against these record facts, the defendant produces geologists whose opinions are adverse to drilling. But Mr. Moody, experienced with the fickleness of oil geology, knows too much to release this lease because of geologic guess. Their science is valuable to condemn the lease in court in justification of a failure diligently to develop; but he will not back their testimony by relinquishing the lease.

While the trial court made no specific finding upon the point, the decree entered must rest upon a finding that defendant has not complied with its implied obligation diligently to explore and develop the leased premises. I agree. The defendant company has tied up this half section for 17 years and has not drilled a single exploratory well thereon; it asks to hold it indefinitely in the future, with no hope of a well unless some other operator drills on adjoining land. Such conduct does not seem to me to square with the "due regard for the interests of the lessor" which was an integral part of its contract, under any rule of law or fair dealing.

I think the two small producing offset wells are enough to hold the forty on which they are situate. But I think a decree should enter that the lease as to the 320 acres be canceled unless, within a reasonable time, an exploratory well is drilled to the Mississippi lime.

[fols. 106 & 106a] IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Honorable Robert E. Lewis, Honorable Orie L. Phillips and Honorable Sam G. Bratton, Circuit Judges

DECREE—Sept. 14, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said District Court with directions to vacate the decree herein without prejudice to the bringing of a new suit, in the event changed conditions should indicate a breach of the implied covenant to develop; and that Mid-Continent Petroleum Corporation, a corporation, appellant, have and recover of and from Annie Sauder, Administratrix of the Estate of Philip Sauder, Deceased; Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, Lillian F. Pinon, Emma M. Meagher, George D. Sauder, Chester A. Sauder, Oliver J. Sauder, Harold W. Sauder, Lorene I. Sauder, a minor, by Annie Sauder, her mother and next friend, Grace Annabell Sauder, Everett Alvin Sauder, Ray Arthur Sauder and Irene Evelyn Sauder, minors, by Mina Sauder, their mother and next friend, appellees, its costs herein.

RECITAL AS TO ISSUANCE OF MANDATE

On October 24, 1933, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and decree of said court, was issued to the United States District Court and on October 26, 1933, the receipt of the clerk of the said District Court for said mandate was received and filed.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI—Filed Dec. 14, 1933

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of five days from this date.

Willis Van Devanter, Associate Justice of the Supreme Court of the United States.

Dated this 14th day of December, 1933.

[fol. 107a] [File endorsement omitted.]

[fol. 108] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 22, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,263. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 660. Annie Sauder, Administratrix of the Estate of Philip Sauder, Deceased, et al., vs. Mid-Continent Petroleum Corporation. Petition for a writ of certiorari and exhibit thereto. Filed December 15, 1933. File No. 660, O. T., 1933.